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TABLE OF CONTENTS

RECENT DECISIONS: THE MARYLAND COURT OF APPEALS

I. ATTORNEY MALPRACTICE	604
A. Noble v. Bruce— <i>Breathing New Life into the Strict Privity Rule in Attorney Malpractice Actions</i>	604
II. CIVIL PROCEDURE	635
A. Porter Hayden Co. v. Bullinger— <i>Expanding Maryland Discovery and the Scope of the Uniform Contribution Among Tortfeasors Act</i>	635
B. Butler v. Tilghman— <i>Redefining the Practice of Strict Compliance in Literal Terms</i>	664
III. CONTRACTS	681
A. MTA v. CSX Transportation, Inc.— <i>The Meaning of “Arising Out of” in Indemnification Clauses</i>	681
IV. CRIMINAL LAW	705
A. State v. White— <i>Formally Adopting the Single Larceny Doctrine in Maryland</i>	705
B. Yoswick v. State— <i>Maryland Courts Accomplish Policy Goal of Preserving Pleas</i>	725
V. CRIMINAL PROCEDURE	744
A. Kostelec v. State— <i>In Anticipation of Anticipatory Warrants: Maryland’s Statutory Barrier and the Meaning of the Court’s Restraint</i>	744
B. Beverly v. State— <i>Prosecutorial Discretion and Mandatory Minimum Sentences</i>	770
C. State v. Ward— <i>The Fourth Amendment Nexus Requirement: Homes and Cars</i>	788
D. <i>In re Tariq A-R-Y—Police Searches of Children’s Belongings Conducted Pursuant to Parental Consent</i>	809

VI.	ESTATES & TRUSTS	841
A.	Kroll v. Nehmer— <i>Declining to Apply the Doctrine of Dependent Relative Revocation</i>	841
VII.	EVIDENCE	867
A.	Key-El v. State— <i>The Tacit Admission Rule Misapplied</i> ..	867
B.	Gunning v. State— <i>Judicial Discretion and Problems of Perception</i>	892
VIII.	FAMILY LAW	920
A.	<i>In re Adoption/Guardianship No. 3598—Violations of the Interstate Compact on the Placement of Children: Implication on Subsequent Petitions for Adoption</i>	920
IX.	HEALTH CARE	960
A.	Warner v. Lerner— <i>Maryland Properly Limits Decision and Reads Provision Under the Maryland Confidentiality of Medical Records Act as Only Allowing Disclosure of Medical Records by the Provider in Possession of the Records</i>	960
X.	INSURANCE	979
A.	Zappone v. Liberty Life Insurance Co.— <i>Maryland Common Law Judicial Remedies Run Concurrent with Administrative Remedies for Alleged Acts of Fraud, Negligence, and Negligent Misrepresentation by an Insurer</i>	979
B.	Sherwood Brands, Inc. v. Hartford Accident & Indemnity Co.— <i>Finding that the Duty to Defend Precedes Notice, Maryland Holds the Liability Insurer Responsible for Pre-Notice Fees and Expenses</i>	1012
XI.	PROFESSIONAL RESPONSIBILITY	1035
A.	Post v. Bregman— <i>Expanding the Application of the Maryland Lawyers' Rules of Professional Conduct</i>	1035
XII.	PUNITIVE DAMAGES	1067
A.	Bowden v. Caldor, Inc.— <i>Abrogation of the Jury's Traditional Role in Determining Punitive Damages</i>	1067
B.	Le Marc's Management Corp. v. Valentin— <i>Raising the Standard for Punitive Damages: Undermining Traditional Purposes and Insulating Reprehensible Conduct</i>	1092
XIII.	TORTS	1117
A.	Eagan v. Calhoun— <i>Parent-Child Immunity: The Time for a Change is Overdue</i>	1117
B.	Baltimore Gas & Electric Co. v. Flipppo: <i>Silent Application of a Limited Attractive Nuisance Doctrine in the State of Maryland</i>	1142

- C. *Franklin v. Morrison—Limiting Tort Indemnity in Maryland to the Realm of Constructive Liability* 1165
- D. *ADM Partnership v. Martin—An Examination of the Modern Employee's Dilemma and the Legitimacy of the Assumption of Risk Defense*..... 1197

**RECENT DECISIONS: THE UNITED STATES COURT OF APPEALS FOR
THE FOURTH CIRCUIT**

- I. CONSTITUTIONAL LAW 1221
 - A. *Boring v. Buncombe County Board of Education—Curricular Choice and the Constitution: Conflicting Views of Teacher Free Speech Rights* 1221
 - B. *Rice v. Paladin Enterprises, Inc.—Erosion on the Slippery Slope of First Amendment Protection for Books* ... 1246
- II. EMPLOYMENT LAW 1280
 - A. *Munday v. Waste Management of North America, Inc.—Inviting Employers to Retaliate Against Employees Who Assert Their Rights Under Title VII*..... 1280
- III. TRADEMARKS 1304
 - A. *Petro Stopping Centers, L.P. v. James River Petroleum, Inc.—Incontestability: Now You See It, and Now You Don't* 1304

Recent Decisions

The Maryland Court of Appeals

I. ATTORNEY MALPRACTICE

A. *Breathing New Life into the Strict Privity Rule in Attorney Malpractice Actions*

In *Noble v. Bruce*,¹ the Court of Appeals considered whether a testamentary beneficiary could maintain a cause of action for professional malpractice against the testator's attorney when there was no privity of contract between the beneficiary and the attorney.² In two consolidated cases, one involving an allegation of negligent estate planning advice,³ and the other a claim of negligent will drafting,⁴ the court held that strict privity was a necessary element in establishing a cause of action by the beneficiaries for attorney malpractice.⁵ While the court may have decided the cases at bar correctly, the court's reasoning suggests a severe limitation of the recent trend in many other jurisdictions, and to a limited degree in Maryland itself, to relax the privity requirement in attorney malpractice suits brought by testamentary beneficiaries.⁶ Unfortunately, this limitation precludes malpractice suits when they are the sole means of compensating innocently injured parties and holding attorneys responsible for their negligent will drafting or estate planning advice.

1. *The Case.*—

a. *Noble v. Bruce.*—In 1991, Earl and Florence Long retained Charles A. Bruce, Jr., an attorney practicing in Somerset County, Maryland, to provide estate planning advice and prepare their wills.⁷ Bruce prepared “mirror wills” for the Longs, which provided that if either spouse was the first to die, the surviving spouse would inherit all of the decedent spouse's interest in their joint prop-

1. 349 Md. 730, 709 A.2d 1264 (1998).

2. *Id.* at 733, 709 A.2d at 1266.

3. *Id.*

4. *Id.*

5. *Id.* at 752-53, 709 A.2d at 1275.

6. See *infra* note 64 and accompanying text (citing cases from several jurisdictions in which a third party beneficiary exception to the strict privity rule has been adopted in attorney malpractice actions brought by testamentary beneficiaries).

7. *Noble*, 349 Md. at 733, 709 A.2d at 1266.

erty.⁸ When the surviving spouse died, all property would then pass to the Longs' children as specified in the will.⁹ These wills were executed on July 29, 1991.¹⁰ On August 28, 1991, Mr. Long died, and his entire estate passed to Mrs. Long as specified in his will.¹¹ Shortly after his death, Mrs. Long transferred all of her real property to two of the Longs' children, Lorraine Kulyncyz and Thomas F. Long.¹² Mrs. Long died on June 22, 1994.¹³ On August 25, 1994, six of the Longs' eight children, who were beneficiaries of their parents' wills, filed a tort suit alleging malpractice against Bruce in the Circuit Court for Somerset County.¹⁴ The plaintiffs alleged that Bruce was negligent in failing to advise the Longs of an estate planning mechanism known as a "bypass trust," which would have allowed both of the Longs to shelter up to \$600,000 in their estates from federal estate tax.¹⁵

Bruce responded with a motion to dismiss, or in the alternative, a motion for summary judgment.¹⁶ In support of his motion, Bruce filed an affidavit in which he asserted that he had advised the Longs regarding the use of a bypass trust, but that they chose not to use the tax sheltering mechanism because it would result in them losing control over their property during their lifetimes.¹⁷ The Circuit Court for Somerset County granted summary judgment in favor of Bruce on July 26, 1995, after determining that the plaintiffs would be unable to prove what the Longs' intentions were in creating the wills or to contradict Bruce's assertion that he had advised the Longs regarding the use of a bypass trust.¹⁸ The court dismissed as "irrelevant" the issue whether a third party beneficiary could maintain a cause of action for professional malpractice against an attorney, with whom they have no privity, for failure to draft a will that gives effect to a testator's intentions regarding the disposition of his estate.¹⁹

8. *Id.* at 733-34, 709 A.2d at 1266.

9. *Id.* at 734, 709 A.2d at 1266. The will specified that the family residence and curtilage on one of the farms would go to Lorraine Kulyncyz, one of the Longs' daughters. *Id.* The Longs' partial interest in certain other real property was to pass to Mr. Long's sister. *Id.* The remainder of the estate was to pass to the Longs' eight children as joint tenants, subject to a life estate in Thomas A. Long, one of the Longs' sons. *Id.*

10. *Id.* at 733, 709 A.2d at 1266.

11. *Id.* at 734, 709 A.2d at 1266.

12. *Id.*

13. *Id.*

14. *Id.* at 733-34, 709 A.2d at 1266. The six plaintiffs included all of the Longs' children except for Lorraine Kulyncyz and Thomas F. Long. *Id.*

15. *Id.* at 734, 709 A.2d at 1266.

16. *Id.* at 735, 709 A.2d at 1266.

17. *Id.* at 734, 709 A.2d at 1266.

18. *Id.* at 735, 709 A.2d at 1267.

19. *Id.*

In an unreported opinion, the Court of Special Appeals affirmed the grant of summary judgment, holding that the Long beneficiaries did not have standing to sue Bruce under a third party beneficiary theory.²⁰ The Court of Special Appeals recognized that the plaintiffs' complaint alleged that they were the intended beneficiaries of the contract between Bruce and the Longs, but noted that in Maryland, this alone was insufficient to maintain a cause of action for attorney malpractice.²¹ Additionally, a testamentary beneficiary must allege that either the will is invalid, the testamentary intent as expressed in the will has not been carried out, or there is a concession of error on the part of the drafting attorney.²² Because the Long beneficiaries did not allege the existence of any of these three situations, they failed to satisfy an element of the cause of action for professional malpractice.²³ The Court of Appeals granted certiorari to determine whether the beneficiaries had standing to sue Bruce for professional malpractice as third party beneficiaries of the contract between him and the Longs.²⁴

b. Fauntleroy v. Blizzard.—In 1983, Mrs. Sue Jackson retained attorney T. Hughlett Henry, Jr., to assist her in planning her estate and drafting her will.²⁵ In her will, executed on March 11, 1983, she bequeathed all of the shares of stock she owned in the Pittsburgh Des Moines Steel Company (PDM) to the children and grandchildren of her brother-in-law, William R. Jackson.²⁶ The will also directed that all of the estate taxes should be paid out of the residuary estate.²⁷ On January 10, 1994, Mrs. Jackson died.²⁸ At the

20. *Noble v. Bruce*, No. 1867, slip op. at 1-2 (Md. Ct. Spec. App. Oct. 15, 1996) (per curiam).

21. *Id.* at 8.

22. *Id.* (citing *Layman v. Layman*, 84 Md. App. 183, 190, 578 A.2d 314, 317 (1990) (quoting *Kirgan v. Parks*, 60 Md. App. 1, 12-13, 478 A.2d 713, 719 (1984))).

23. *Id.* at 9. The court also ruled that summary judgment was properly granted by the trial judge even though discovery had yet to be completed. *Id.*

24. *Noble*, 349 Md. at 733, 735, 709 A.2d at 1266, 1267.

25. *Id.* at 735, 709 A.2d at 1267.

26. *Id.* at 735-36, 709 A.2d at 1267.

27. *Id.* at 736, 709 A.2d at 1267. On March 29, 1983, Henry sent a letter to Mrs. Jackson estimating the federal taxes that would be imposed on her estate after her death. *Id.* The letter also included a statement by Henry to the effect that he was pleased that the decision had been made "to have the bulk of the PDM stock pay its own share of [the] tax." *Id.* In 1988, Mrs. Jackson revoked this first will and executed a new one, which was also prepared by Henry. *Id.* The new will was in most respects similar to the previous one and also directed that any taxes should be paid out of the residuary estate. *Id.* In 1990, Mrs. Jackson and PDM entered into a stock purchase agreement, which provided that PDM would buy back all of Mrs. Jackson's PDM shares upon her death at the market price as of the date of her death. *Id.* The agreement was never implemented because of the inability

time of her death, Mrs. Jackson's estate consisted of a farm and 44,816 shares of PDM stock worth approximately \$1.4 million.²⁹ The Fauntleroy beneficiaries, as the sole residuary beneficiaries, bore the entire burden of the estate and inheritance taxes, which totaled approximately \$910,000.³⁰

On January 8, 1997, the Fauntleroy beneficiaries filed a complaint in the Circuit Court for Talbot County against Sara N. Blizzard and W. Thomas Fountain, Personal Representatives of the Estate of Henry and his law firm.³¹ The complaint alleged that Henry had committed malpractice by preparing a will that provided for estate taxes to be paid out of the residuary estate, contrary to Mrs. Jackson's intent.³² The defendants filed a motion to dismiss or, in the alternative, a motion for summary judgment.³³ The circuit court granted the defendants' motion to dismiss on April 4, 1997, ruling that the Fauntleroy beneficiaries lacked standing to sue the defendants under the rule announced in *Kirgan v. Parks*.³⁴ The Fauntleroy beneficiaries appealed to the Court of Special Appeals, and also filed a petition for writ of certiorari with the Court of Appeals.³⁵ Before proceedings began in the Court of Special Appeals, the Court of Appeals issued a writ of certiorari to determine whether a will beneficiary has standing to sue an attorney for professional malpractice in the absence of privity between them.³⁶ Because *Fauntleroy* raised substantially the same issue presented by *Noble*, the Court of Appeals consolidated both cases into one opinion.³⁷

to satisfy a condition that the purchase be treated as a sale or exchange, rather than a dividend, for tax purposes. *Id.*

28. *Id.*

29. *Id.*

30. *Id.* at 737, 709 A.2d at 1267.

31. *Id.*, 709 A.2d at 1268.

32. *Id.*

33. *Id.*

34. *Id.* In *Kirgan v. Parks*, 60 Md. App. 1, 478 A.2d 713 (1984), the Court of Special Appeals ruled that a testamentary beneficiary could not maintain a cause of action for negligence against the testator's attorney when "the will is valid, the testamentary intent as expressed in the will has been carried out, and there is no concession of error by the attorney." *Id.* at 12, 478 A.2d at 718-19; see *infra* notes 121-130 and accompanying text (discussing *Kirgan*).

35. *Noble*, 349 Md. at 737, 709 A.2d at 1268.

36. *Id.*

37. *Id.* at 733, 709 A.2d at 1266.

2. *Legal Background.*—

a. The Origin of Strict Privity.—The issue of whether a party can maintain an action in negligence against an attorney with whom they are not in privity was first addressed in this country in 1879 by the United States Supreme Court in *Savings Bank v. Ward*.³⁸ In that case, the defendant attorney, Ward, conducted a title search on behalf of a landowner who wanted to use a parcel of land as collateral for a loan.³⁹ Ward reported to his client that his title in the land was good, but in actuality, a previously recorded and valid conveyance existed.⁴⁰ On the basis of this erroneous report, the bank extended a loan to Ward's client, who subsequently defaulted.⁴¹ When the bank attempted to sell the land in satisfaction of the debt, it discovered that the deed was worthless.⁴² The bank sued Ward for the amount of the loan.⁴³ In rejecting the bank's cause of action against the attorney, the Court stated:

Beyond all doubt, the general rule is that the obligation of the attorney is to his client and not to a third party, and unless there is something in the circumstances of this case to take it out of that general rule, it seems clear that the proposition of the defendant must be sustained.⁴⁴

The Court concluded that in order for a party to maintain an action for negligence against an attorney, the party must establish privity of contract between themselves and a defendant attorney.⁴⁵ Despite this strong language by the Supreme Court, however, only four states maintain a requirement of strict privity for all attorney malpractice claims involving wills and estate planning.⁴⁶

38. 100 U.S. 195 (1879).

39. *Id.* at 197.

40. *Id.* at 197-98.

41. *Id.*

42. *Id.* at 198.

43. *Id.*

44. *Id.* at 200.

45. *Id.* at 202-03.

46. See Helen Bishop Jenkins, *Privity—A Texas-Size Barrier to Third Parties for Negligent Will Drafting—An Assessment and Proposal*, 42 BAYLOR L. REV. 687, 697-98 (1990) (noting that courts in Missouri, Nebraska, New York, Ohio, and Texas "still regard the privity barrier as a bar to recovery by the third party will beneficiary" (citing *Williams v. Bryan, Cave, McPheeters, McRoberts*, 774 S.W.2d 847, 849 (Mo. Ct. App. 1989); *Lilyhorn v. Dier*, 335 N.W.2d 554 (Neb. 1983); *Viscardi v. Lerner*, 510 N.Y.S.2d 183, 185 (App. Div. 1986) (mem.); *Simon v. Zipperstein*, 512 N.E.2d 636, 638 (Ohio 1987) (per curiam); *Dickey v. Jansen*, 731 S.W.2d 581 (Tex. App. 1987, writ ref'd n.r.e.)). Although Jenkins cites Missouri as one of the states continuing to apply the strict privity rule, it changed its position in 1995 in *Donahue v. Shughart, Thomson & Kilroy, P.C.*, 900 S.W.2d 624, 628-29 (Mo. 1995).

b. *The Decline of Strict Privity—California's "Balancing" Theory.*—For nearly 100 years after *Ward*, the "strict privity" requirement in attorney malpractice actions reigned as the dominant rule in all jurisdictions.⁴⁷ Although courts began to relax the requirement of contractual privity in other tort areas in the early 1900s,⁴⁸ it was not until 1961, in the California case of *Lucas v. Hamm*,⁴⁹ that a party was permitted to pursue a malpractice action against an attorney with whom they were not in privity.⁵⁰ In *Lucas*, the testator hired the defendant attorney to prepare a will under which the plaintiffs were to be made beneficiaries of a trust.⁵¹ The trust provision in the will violated the rule against perpetuities, and the will was held invalid when submitted to probate.⁵² As a result, the plaintiffs were compelled to enter into a settlement with the testator's blood relatives under which they received \$75,000 less than what they would have received had the trust provision been valid.⁵³

The California Supreme Court held that the determination whether a beneficiary could bring an action for negligent will drafting against an attorney with whom they were not in privity was a question of public policy involving the balancing of various factors.⁵⁴ These factors include: "the extent to which the transaction was intended to affect the plaintiff, the foreseeability of harm to him, the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant's conduct and the injury, and the policy of preventing future harm."⁵⁵ The *Lucas* court noted that, in this case,

(en banc), to allow suits against attorneys by nonclients. See *infra* note 61 and accompanying text.

47. See Douglas A. Cifu, *Expanding Legal Malpractice to Nonclient Third Parties—At What Cost?*, 23 COLUM. J.L. & SOC. PROBS. 1, 8-9 (1989) (noting that in 1958, the California Supreme Court "became the first court to depart from the strict privity rule" in allowing a beneficiary to recover against a notary public who negligently prepared a will, and three years later, applied this rule to allow a will beneficiary the right to recover against a drafting attorney).

48. See, e.g., *Glanzer v. Shepard*, 135 N.E. 275, 276 (N.Y. 1922) (holding that lack of privity did not prevent a party from recovering against a public weigher); *MacPherson v. Buick Motor Co.*, 111 N.E. 1050, 1053-54 (N.Y. 1916) (discarding the privity of contract requirement in product liability actions).

49. 364 P.2d 685 (Cal. 1961) (in bank).

50. *Id.* at 688; see Martin D. Begleiter, *Attorney Malpractice in Estate Planning—You've Got To Know When To Hold Up, Know When To Fold Up*, 38 U. KAN. L. REV. 193, 195 (1990) (stating that the rule requiring privity in attorney malpractice actions "changed abruptly in 1961 when the Supreme Court of California decided . . . *Lucas v. Hamm*").

51. *Lucas*, 364 P.2d at 686.

52. *Id.* at 686-87.

53. *Id.* at 687.

54. *Id.* at 687-88.

55. *Id.* at 687 (citing *Biakanja v. Irving*, 320 P.2d 16 (Cal. 1958)).

one of the primary purposes of the transaction between the testator and the defendant attorney was to provide for a transfer of property to the plaintiffs.⁵⁶ In the event that the intended bequest failed, the damage to the plaintiffs was clearly foreseeable.⁵⁷ Additionally, the court reasoned, if persons such as the plaintiffs were unable to recover for this type of loss, which resulted from the negligence of the attorney, no one would be able to, and the policy of preventing future harm would be frustrated.⁵⁸ The court also considered whether imposition of liability would place an undue burden on the legal profession.⁵⁹ The court answered in the negative, deciding that the lack of privity in this particular case did not preclude the plaintiff from maintaining a tort action against the defendant.⁶⁰

Several other jurisdictions have followed the California "balancing of factors" test in determining the liability of a defendant attorney to will beneficiaries when there is no privity of contract between them.⁶¹ This test has not gained widespread acceptance in most juris-

56. *Id.* at 688.

57. *Id.*

58. *Id.*

59. *Id.*

60. *Id.* Despite this holding, the court decided that due to the confusion and difficulty associated with the rule against perpetuities, the defendant's error did not constitute a breach of the applicable standard of care. *Id.* at 690. The court also held that beneficiaries of a will who were damaged by a drafting error could maintain an action in contract against the drafting attorney under a third party beneficiary theory. *Id.* at 688. However, the court concluded that the appropriate standard of care was equally applicable regardless of whether such a claim sounded in tort or contract. *Id.* at 689. Therefore, even in a contract action, a plaintiff would have to prove that the attorney did not "use such skill, prudence, and diligence as lawyers of ordinary skill and capacity commonly possess and exercise in the performance of the tasks which they undertake." *Id.* (citing *In re Kruger's Estate*, 63 P. 31 (Cal. 1900); *Moser v. Western Harness Racing Ass'n*, 200 P.2d 7 (Cal. Dist. Ct. App. 1948); *Armstrong v. Adams*, 283 P. 871 (Cal. Dist. Ct. App. 1929)). A later California case expressed a somewhat more limited view: "[The contractual] theory of recovery . . . is conceptually superfluous since the crux of the action must lie in tort in any case; there can be no recovery without negligence." *Heyer v. Flaig*, 449 P.2d 161, 164 (Cal. 1969) (in bank).

61. See *Franko v. Mitchell*, 762 P.2d 1345, 1354 (Ariz. Ct. App. 1988) (holding that under a balancing test which utilized the same factors as the California Supreme Court, a third party would be allowed to sue an attorney for negligence under certain circumstances); *Donahue v. Shughart*, Thomson & Kilroy, P.C., 900 S.W.2d 624, 628 (Mo. 1995) (en banc) (noting that with slight modification, the California balancing approach "is an appropriate method for determining an attorney's duty to non-clients"); *Jenkins v. Wheeler*, 316 S.E.2d 354, 356-57 (N.C. Ct. App. 1984) (noting that "North Carolina now recognizes a cause of action in tort by non-client third parties for attorney malpractice" and that it considers the factors enunciated by the California Supreme Court in *Lucas v. Hamm*); *Auric v. Continental Cas. Co.*, 331 N.W.2d 325, 329 (Wis. 1983) (holding that, on examination of the factors set forth in *Lucas v. Hamm*, a lack of privity should not bar an action against an attorney by a nonclient will beneficiary).

dictions, however, and at least one commentator has suggested that, even in California, this test is nothing more than "a disguised rule of liability based upon third party beneficiary theory."⁶²

c. *The Evolution of the Third Party Beneficiary Exception to Strict Privity.*—Many jurisdictions were reluctant to adopt California's "balancing of factors" theory to deal with the question of privity in attorney malpractice claims.⁶³ However, it soon became apparent that most jurisdictions were willing to move away from strict privity. Instead of adopting the balancing test as announced in *Lucas v. Hamm*, many jurisdictions have found an exception to the strict privity rule under a third party beneficiary theory, particularly in cases involving will drafting and estate planning.⁶⁴

62. See Cifu, *supra* note 47, at 11. Cifu suggests that subsequent California cases addressing the issue of attorney liability to parties with whom they are not in privity have been reluctant to hold such attorneys liable for negligent conduct outside of the context of will drafting. *Id.* at 10 n.61 (citing *Courtney v. Waring*, 237 Cal. Rptr. 233, 238-39 (Ct. App. 1987)); see also *infra* Part 2.c (discussing recovery for attorney malpractice under a third party beneficiary theory).

63. See *Guy v. Liederbach*, 459 A.2d 744, 749-50 (Pa. 1983) (criticizing the California balancing test as proving unworkable and "[leading] to *ad hoc* determinations and inconsistent results").

64. See *Stowe v. Smith*, 441 A.2d 81, 84 (Conn. 1981) (recognizing that "a person named in an invalid will could recover as an intended third party beneficiary of an attorney-client agreement to prepare that will, if the attorney's error caused the loss" (citing *Lucas*, 364 P.2d 685)); *Needham v. Hamilton*, 459 A.2d 1060, 1062 (D.C. 1983) ("We hold that the better view is that which allows the intended beneficiary of a will a malpractice cause of action against the drafting attorneys."); *Lorraine v. Grover, Ciment, Weinstein & Stauber, P.A.*, 467 So. 2d 315, 317 (Fla. Dist. Ct. App. 1985) ("In limited circumstances . . . an intended beneficiary under a will may maintain a legal malpractice action against the attorney who prepared the will, if through the attorney's negligence a devise to that beneficiary fails." (citing *DeMaris v. Asti*, 426 So. 2d 1153 (Fla. Dist. Ct. App. 1983); *McAbee v. Edwards*, 340 So. 2d 1167 (Fla. Dist. Ct. App. 1976))); *Jewish Hosp. v. Boatmen's Nat'l Bank*, 633 N.E.2d 1267, 1275 (Ill. App. Ct. 1994) ("[U]nder limited circumstances, a non-client may maintain . . . a third-party-beneficiary/breach-of-contract action against an attorney." (citing *Ogle v. Fuiten*, 466 N.E.2d 224 (Ill. 1984); *Pelham v. Griesheimer*, 440 N.E.2d 96 (Ill. 1982))); *Walker v. Lawson*, 526 N.E.2d 968, 968 (Ind. 1988) ("[A]n action will lie by a beneficiary under a will against the attorney who drafted that will on the basis that the beneficiary is a known third party."); *Schreiner v. Scoville*, 410 N.W.2d 679, 682 (Iowa 1987) ("[A] lawyer owes a duty of care to the direct, intended, and specifically identifiable beneficiaries of the testator as expressed in the testator's testamentary instruments."); *Pizel v. Zuspahn*, 795 P.2d 42, 48 (Kan. 1990) ("The strict requirement of privity of contract . . . has been eased when an attorney renders services that the attorney should have recognized as involving a foreseeable injury to a third-party beneficiary of the contract."); *Charia v. Hulse*, 619 So. 2d 1099, 1101 (La. Ct. App. 1993) (recognizing the right of an "intended legatee to bring [a] claim as a third-party beneficiary" of a contract between a drafting attorney and a testator); *Mieras v. DeBona*, 550 N.W.2d 202, 207 (Mich. 1996) (agreeing that the plaintiffs were intended beneficiaries of the testator's will, and that the absence of privity between the plaintiffs and defendant attorney did not preclude them from maintaining an action in either contract or tort against the attorney); *Simpson v. Calivas*, 650

In *Guy v. Liederbach*,⁶⁵ the Supreme Court of Pennsylvania provided a thorough analysis of the applicability of third party beneficiary theory as an exception to the strict privity rule in the will drafting context. In this case, the plaintiff was named as the sole residuary beneficiary in a will prepared by the defendant attorney.⁶⁶ When the will was submitted to probate in New Jersey, the court repealed the plaintiff's legacy because she had acted as a witness to the will signing in violation of New Jersey law.⁶⁷ The plaintiff brought suit against the drafting attorney under both tort and contract theories of recovery.⁶⁸ Addressing the tort claim first, the Supreme Court of Pennsylvania dismissed the California balancing test as being "unworkable" and leading to "*ad hoc* determinations and inconsistent results."⁶⁹ The court concluded that to maintain a suit against an attorney that sounded in tort, the element of privity would continue to be required.⁷⁰

A.2d 318, 322-23 (N.H. 1994) ("[W]here . . . a client has contracted with an attorney to draft a will and the client has identified to whom he wishes his estate to pass, that identified beneficiary may enforce the terms of the contract as a third-party beneficiary." (citing *Stowe*, 441 A.2d at 84; *Ogle*, 466 N.E.2d at 227; *Hale v. Groce*, 744 P.2d 1289, 1292 (Or. 1987))); *Albright v. Burns*, 503 A.2d 386, 389 (N.J. Super. Ct. App. Div. 1986) ("[P]rivty should not be required between the attorney and one harmed by his breach of duty where the attorney had reason to foresee the specific harm which occurred." (citing *Stewart v. Sbarro*, 362 A.2d 581 (N.J. Super. Ct. App. Div. 1976))); *Hale*, 744 P.2d at 1292 ("We agree that the [will] beneficiary in these cases is not only a plausible but a classic 'intended' third-party beneficiary of the lawyer's promise to his client . . . and may enforce the duty so created . . ."); *Guy*, 459 A.2d at 751 (holding that named beneficiaries under a will who lose their intended legacy due to the failure of an attorney to draft properly the will may recover in contract under a third party beneficiary theory); *Persche v. Jones*, 387 N.W.2d 32, 36 (S.D. 1986) ("One who negligently fails to [prepare] a will becomes liable in tort to an intended beneficiary who suffered damage because of the invalidity of the testamentary instrument."); *Stangland v. Brock*, 747 P.2d 464, 467-68 (Wash. 1987) (en banc) (finding that nonclient beneficiaries could establish a duty owed to them by a testator's attorney under either the California balancing theory or the third party beneficiary theory, but dismissing the plaintiffs' case for failure to show a breach of the applicable duty of care on the part of the defendant attorney); see also RONALD E. MALLIN & JEFFREY M. SMITH, 4 LEGAL MALPRACTICE § 31.4 (4th ed. 1996). Although the third party beneficiary concept is contractual in nature, many of these courts have used it to allow recovery under tort causes of action. See *infra* note 81 and accompanying text. This has been done by expanding the scope of duty concept in negligence to encompass those who would be considered third party beneficiaries of the agreement to draft the testator's will. See *infra* notes 116-117 and accompanying text.

65. 459 A.2d 744 (Pa. 1983).

66. *Id.* at 747.

67. *Id.*

68. *Id.*

69. *Id.* at 749.

70. *Id.* at 750.

Recognizing the need for a “properly restricted cause of action for beneficiaries such as [the plaintiff],”⁷¹ the *Guy* court reasoned that a contract action could be maintained under a third party beneficiary theory,⁷² as enunciated by the *Restatement (Second) of Contracts* § 302.⁷³ The court utilized the *Restatement’s* two-part test to determine whether a person could qualify as a third party beneficiary.⁷⁴ First, “the recognition of the beneficiary’s right must be ‘appropriate to effectuate the intention of the parties.’”⁷⁵ Second, “the performance must ‘satisfy an obligation of the promisee to pay money to the beneficiary’ or ‘the circumstances [must] indicate that the promisee intends to give the beneficiary the benefit of the promised performance.’”⁷⁶ Applying this test to beneficiaries of a will, the court noted that the first prong of the test would be satisfied because “[t]he will, providing for one or more named beneficiaries, clearly manifests the intent of the testator to benefit the legatee.”⁷⁷ Moreover, because the estate would not or could not bring suit against the attorney, recognizing this right would be “appropriate to effectuate the intention of the parties.”⁷⁸ As to the second prong, the testator’s arrangements with the attorney and the text of his will would be the “circumstances which clearly indicate the testator’s intent to benefit a named legatee.”⁷⁹

Most jurisdictions followed Pennsylvania’s lead in establishing a third party beneficiary exception,⁸⁰ however, unlike the Pennsylvania court, many jurisdictions also permit recovery under a cause of action

71. *Id.* at 751.

72. *Id.* at 752. Despite the *Guy* court’s focus on a contract cause of action, as opposed to one based in tort, the court noted:

Although a plaintiff on a third party beneficiary theory in contract may in some cases have to show a deviation from the standard of care, as in negligence, to establish breach, the class of persons to whom the defendant may be liable is restricted by principles of contract law, not negligence principles relating to foreseeability or scope of the risk.

Id.

73. *Id.* at 751.

74. *Id.*

75. *Id.* (quoting RESTATEMENT (SECOND) OF CONTRACTS § 302 (1979)).

76. *Id.* (quoting RESTATEMENT (SECOND) OF CONTRACTS § 302).

77. *Id.*

78. *Id.* (internal quotation marks omitted) (quoting RESTATEMENT (SECOND) OF CONTRACTS § 302(1)). The court explained that while named beneficiaries are clearly intended, as opposed to incidental beneficiaries, the will could fail to name beneficiaries who might be either intended or incidental beneficiaries. *Id.* at n.8. The court stated that it would be up to the trial court to determine whether “the circumstances indicate an intent to benefit non-named beneficiaries.” *Id.* at 752 n.8.

79. *Id.* at 752.

80. See *supra* note 64 and accompanying text.

sounding in tort.⁸¹ For example, in *Stowe v. Smith*,⁸² the Connecticut Supreme Court noted that "[u]nless a particular conflict between the rules of contract and tort requires otherwise, a plaintiff may choose to proceed in contract, tort, or both."⁸³ In *Jewish Hospital v. Boatmen's National Bank*,⁸⁴ an Illinois appellate court explained that "[r]egardless of which theory of recovery is pled, nonclient plaintiffs 'must demonstrate that they are in the nature of third-party intended beneficiaries of the relationship between the attorney and client.'"⁸⁵ In *Heyer v. Flaig*,⁸⁶ the California Supreme Court indicated even in a case brought under a contract cause of action, "there can be no recovery without [a showing of] negligence."⁸⁷

d. The Strict Privity Rule in Maryland.—Recently, Maryland courts have struggled to determine when the strict privity requirement should be applied to attorney malpractice actions. Like other jurisdictions, Maryland originally adhered to the strict privity requirement, which was enunciated by the Court of Appeals in *Kendall v. Rogers*.⁸⁸ In *Kendall*, the defendant attorney erroneously informed the plaintiffs that they had a legal responsibility to clear up a defective title to land that they had recently conveyed to the defendant's clients under a special warranty deed.⁸⁹ The plaintiffs accepted this advice and discharged the defendant's clients from a mortgage they had granted plaintiffs, on which over \$3000 was still due, for the purpose of correcting the title.⁹⁰ The plaintiffs later discovered that they were not liable for the defective title because the defect did not come about

81. See, e.g., *Jewish Hosp. v. Boatmen's Nat'l Bank*, 633 N.E.2d 1267, 1275 (Ill. App. Ct. 1994) (noting that "a nonclient may maintain either a negligence action or a third-party-beneficiary/breach-of-contract action against an attorney" (citing *Ogle v. Fuiten*, 466 N.E.2d 244 (Ill. 1984); *Pelham v. Griesheimer*, 440 N.E.2d 96 (Ill. 1982))).

82. 441 A.2d 81 (Conn. 1981).

83. *Id.* at 84 (footnote omitted) (citing *Watrous v. Sinoway*, 65 A.2d 473 (Conn. 1949); *Dean v. Hershowitz*, 177 A. 262 (Conn. 1935); *Hickey v. Slattery*, 131 A. 558 (Conn. 1926)).

84. 663 N.E.2d 1267 (Ill. App. Ct. 1994).

85. *Id.* at 1275 (quoting *McLane v. Russel*, 546 N.E.2d 499, 502 (Ill. 1989)).

86. 449 P.2d 161 (Cal. 1969) (in bank).

87. *Id.* at 164.

88. 181 Md. 606, 31 A.2d 312 (1943). Although the *Noble* court cited *Wloradek v. Thrift*, 178 Md. 453, 13 A.2d 774 (1940), as the first Maryland case to apply the strict privity rule to attorney malpractice cases, in fact, *Wloradek* involved a breach of contract claim by several land buyers against two attorneys for allegedly failing to conduct a proper title examination. *Id.* at 461, 13 A.2d at 778. Indeed, the *Wloradek* court noted that "[i]t seems generally accepted that the liability of the defendants as attorneys to examine and pass upon a title to land is founded in contract and not on tort, and, therefore, does not, as a general rule, extend beyond the person by whom they were so employed." *Id.* at 468, 13 A.2d at 781.

89. *Kendall*, 181 Md. at 608, 31 A.2d at 313.

90. *Id.*

through any act of their own, or through an act of anyone claiming through them.⁹¹ In a subsequent lawsuit, the plaintiffs contended that, although they were not represented by counsel, the circumstances of the situation led them to believe, and they had the right to believe, that the defendant attorney was acting to protect their rights as well as those of his clients.⁹² Additionally, the plaintiffs claimed that they had relied on the defendant's statements regarding their duty to correct the defective title and had discharged the defendant's clients from the mortgage on the basis of these statements.⁹³ The plaintiffs argued that because this advice amounted to negligence on the part of the defendant, they were entitled to damages resulting from their inability to collect on the mortgage.⁹⁴ The Court of Appeals held that in order for a plaintiff to maintain a suit against an attorney for negligence, the plaintiff must prove three things: "(1) The attorney's employment; (2) his neglect of a reasonable duty; and (3) that such negligence resulted in and was the proximate cause of loss to the client."⁹⁵ The court looked to the facts alleged in the complaint and determined that the relationship between the plaintiffs and the defendant did not rise to the level of employment, and, therefore, the defendant attorney could not be held liable to the plaintiffs for negligence.⁹⁶

The Maryland courts applied the rule of strict privity without exception for almost thirty years after *Kendall*. However, in the 1972 case of *Prescott v. Coppage*,⁹⁷ the Court of Appeals demonstrated a willingness to move beyond this requirement for the first time. In *Prescott*, the plaintiff was the receiver for Security Financial Insurance Corporation (Security), a creditor of Maryland Thrift Savings and Loan Company (Maryland Thrift).⁹⁸ The defendants were the receiver for Maryland Thrift and Prescott, a court-appointed attorney charged with assisting the receiver with "the performance of his duties."⁹⁹ The plaintiff's complaint centered around a \$40,000 debt owed to Security by Maryland Thrift.¹⁰⁰ The complaint alleged that the defendants had

91. *Id.* at 609, 31 A.2d at 314.

92. *Id.* at 608, 31 A.2d at 313.

93. *Id.*

94. *Id.* at 610, 31 A.2d at 314.

95. *Id.* at 611-12, 31 A.2d at 315 (internal quotation marks omitted) (quoting *Maryland Cas. Co. v. Price*, 231 F. 397, 401 (4th Cir. 1916)).

96. *Id.* at 613, 31 A.2d at 315.

97. 266 Md. 562, 296 A.2d 150 (1972).

98. *Id.* at 565-66, 296 A.2d at 152.

99. *Id.* at 565, 574, 296 A.2d at 151, 156.

100. *Id.* at 565, 296 A.2d at 151.

improperly distributed Maryland Thrift's assets to lower priority creditors, instead of Security, who had a higher priority.¹⁰¹ Prescott argued that the plaintiff did not have standing to sue him because there was no privity of contract between them.¹⁰² The Court of Appeals held that all of the creditors of Maryland Thrift, including Security, were third party beneficiaries,¹⁰³ and that the court order appointing Prescott "by necessary implication, bound him to those creditor beneficiaries."¹⁰⁴ Therefore, because Prescott had accepted the duties as specified in the court order, along with the aforementioned conditions, the plaintiff had standing to sue.¹⁰⁵

Thirteen years later, the Court of Appeals squarely confronted the issue of privity in attorney malpractice claims in *Flaherty v. Weinberg*.¹⁰⁶ In 1977, the plaintiffs, Robert and Sally Flaherty, purchased a home that was financed by First Federal Savings and Loan (First Federal).¹⁰⁷ First Federal retained the services of the defendant attorney and his law firm to represent the bank at settlement.¹⁰⁸ The Flahertys were not represented by an attorney.¹⁰⁹ At settlement, the bank's attorney assured the Flahertys that the property described in the sale contract was the property they were purchasing and that the house was located within the described boundary lines.¹¹⁰ The attorney also provided the Flahertys with a survey that supported his statements.¹¹¹ In 1982, in preparation for the construction of improvements to the property, the Flahertys obtained another survey of their land. That survey revealed that the original survey obtained from the bank's attorney was erroneous, and that several prior improvements constructed on the property encroached upon their neighbor's land.¹¹² The Flahertys then filed suit against the attorney, alleging negligence and breach of warranty, and in an amended declaration, added an assertion that First Federal's hiring of the attorney was intended to

101. *Id.* It is not clear whether this suit was brought in tort or contract.

102. *Id.* at 574, 296 A.2d at 156.

103. *Id.* The court noted that whether a class of persons met the definition of a creditor beneficiary depended on the intention of the parties "as expressed in the language of the instrument and consideration of the surrounding circumstances as reflecting upon the parties' intention." *Id.*

104. *Id.*

105. *Id.*

106. 303 Md. 116, 492 A.2d 618 (1985).

107. *Id.* at 132, 492 A.2d at 626.

108. *Id.*

109. *Id.*

110. *Id.*

111. *Id.*

112. *Id.* at 132-33, 492 A.2d at 626.

benefit them.¹¹³ The trial court dismissed this suit, ruling that because there was no privity of contract between the attorney and the Flahertys, the attorney owed them no duty.¹¹⁴

After examining national trends, as well as recent Maryland cases addressing the subject, the *Flaherty* court decided that the third party beneficiary theory operated as a limited exception to the general rule requiring strict privity in attorney malpractice claims.¹¹⁵ The court reasoned that "the scope of duty concept in negligence actions may be analogized to the third-party beneficiary concept in the context of attorney malpractice cases."¹¹⁶ This analogy was necessary because the third party beneficiary doctrine is a concept usually applied in contract cases, while the *Flaherty* court was faced with a cause of action brought under a negligence theory, in which the scope of the duty owed is the relevant consideration. Thus, in order to establish a tort duty owed by an attorney to a nonclient, the nonclient must establish that the intent of the client to benefit the nonclient was "a direct purpose of the transaction or relationship."¹¹⁷ The court emphasized that this exception, if properly applied, would not expose an attorney to endless liability and would have limited application in adversarial proceedings.¹¹⁸

The court applied this rationale to the facts of the case and determined that the Flahertys' allegations that the hiring of the attorney was intended to benefit both themselves and First Federal, and that their interests were identical to those of First Federal, were tantamount to alleging that they were intended to benefit directly from the attorney's services.¹¹⁹ Therefore, the court concluded, the Flahertys' claim was sufficient to survive a motion to dismiss.¹²⁰

The Maryland courts have had only a few occasions to consider the issue of attorney malpractice in the context of will drafting and estate planning, when beneficiaries of a will, or those claiming to be beneficiaries, have brought a cause of action for professional malpractice against the testator's attorney. Perhaps the most significant of

113. *Id.* at 133, 492 A.2d at 626-27.

114. *Id.*, 492 A.2d at 627.

115. *Id.* at 129, 492 A.2d at 624.

116. *Id.* at 130, 492 A.2d at 625.

117. *Id.* at 130-31, 492 A.2d at 625.

118. *Id.* at 131, 492 A.2d at 626. The court stressed that this exception could play only a limited role in adversarial proceedings because under the *Maryland Code of Professional Responsibility*, a lawyer is required to represent his client zealously and not to represent conflicting interests in a transaction. *Id.* (citing MD. CODE OF PROFESSIONAL RESPONSIBILITY Canon 5, 7 (1984)).

119. *Id.* at 138-39, 492 A.2d at 629.

120. *Id.* at 139, 492 A.2d at 630.

these decisions is *Kirgan v. Parks*.¹²¹ In answering the broad question of whether such a cause of action could ever be maintained, the Court of Special Appeals in *Kirgan* responded with "a definite maybe."¹²² In *Kirgan*, the plaintiff alleged that she had referred the testator to her attorney, the defendant, to effect a change in his will in the plaintiff's favor.¹²³ Upon the death of the testator, the plaintiff discovered that she was left only "tangible personal property," valued at about \$7000.¹²⁴ The bulk of the testator's estate, over \$5,000,000, was left to a charitable trust, of which the defendant and First National Bank of Maryland were named co-trustees.¹²⁵ The plaintiff filed suit in the Circuit Court for Baltimore City, alleging, *inter alia*, negligence on the part of the defendant attorney for failing to prepare the testator's will so as to reflect his intention to make "ample and adequate" provisions for her.¹²⁶ The plaintiff's complaint also included a contract action based on the theory that she was a third party beneficiary of the contract of employment between the defendant attorney and the testator.¹²⁷ The court never answered the question whether a beneficiary of a will could ever maintain a legal malpractice action against the testator's attorney.¹²⁸ Instead, it disposed of the case by holding that such a cause of action could not be maintained when "the will is valid, the testamentary intent *as expressed in the will* has been carried out, and there is no concession of error by the attorney."¹²⁹ Because the plaintiff's allegations regarding what her share of the estate should have been were contrary to that which was expressed in the testator's will, she had no cause of action against the attorney for negligent will drafting.¹³⁰

121. 60 Md. App. 1, 478 A.2d 713 (1984).

122. *Id.* at 3, 478 A.2d at 714 (internal quotation marks omitted).

123. *Id.* at 4, 478 A.2d at 714.

124. *Id.*

125. *Id.*

126. *Id.* at 5, 478 A.2d at 715.

127. *Id.*

128. *Id.* at 12, 478 A.2d at 718 ("We need not decide whether, in an appropriate case, the beneficiary of a will can maintain a legal malpractice action in this state against the testator's attorney for negligence in preparing the will . . . or whether an action of that nature should be in contract or tort.")

129. *Id.*, 478 A.2d at 719. The court noted that the will is a solemn document which, under statute, must be in writing, signed by the testator, and attested to by two witnesses. *Id.* at 12-13, 478 A.2d at 719 (citing MD. CODE ANN., EST. & TRUSTS § 4-102 (1974)). When the language of a will is plain and unambiguous, no extrinsic evidence is admissible to show a contrary intent on the part of the testator, because "evidence intended to alter the language of a will would violate [the] statute." *Id.* at 13, 478 A.2d at 719 (citing *Jones v. Holloway*, 183 Md. 40, 46-47, 36 A.2d 551, 554 (1944)).

130. *Id.* at 13, 478 A.2d at 719.

Several years later, in *Layman v. Layman*,¹³¹ the Court of Special Appeals once again considered the question whether an attorney drafting a will owes any duty to beneficiaries of the will.¹³² The court ruled that the plaintiffs in the case had not satisfied the initial requirement of demonstrating that they were third party beneficiaries because they did not allege that the testator's intent to benefit them was a direct purpose of the will transaction.¹³³ Furthermore, the court noted that under the *Kirgan* test, the plaintiffs could not maintain a cause of action against the defendant attorney because there was no suggestion that this particular will was not valid, the intent as expressed in the will had been carried out, and there was no concession of error on the part of the defendant attorney.¹³⁴

Thus, after many years of insisting otherwise, the Maryland courts finally recognized a third party beneficiary exception to the strict privity rule in attorney malpractice actions in *Flaherty*.¹³⁵ However, the Court of Special Appeals, in *Kirgan* and *Layman*, required that a will beneficiary attempting to use this exception also establish that either the will is invalid, the testamentary intent as evidenced on the face of the will was not carried out, or that the attorney drafting the will has conceded error.¹³⁶ It is against this backdrop that the Court of Appeals considered *Noble v. Bruce*.

3. *The Court's Reasoning.*—In *Noble v. Bruce*, the Court of Appeals held that the rule of strict privity applies in a malpractice action against an attorney for negligent will drafting and estate planning.¹³⁷ The court came to this determination by declining to recognize the *Noble* and *Fauntleroy* plaintiffs as third party beneficiaries of the will drafting agreements with the testators' respective attorneys, and then discussing the policy rationales for retaining a strict privity rule.¹³⁸ The court concluded that neither set of beneficiaries could maintain a cause of action for malpractice against either attorney because the beneficiaries showed no employment relation between themselves and the attorneys.¹³⁹ Judge Chasanow, writing for a unanimous court,

131. 84 Md. App. 183, 578 A.2d 314 (1990).

132. *Id.* at 184, 578 A.2d at 314.

133. *Id.* at 189, 578 A.2d at 317.

134. *Id.* at 190, 578 A.2d at 317.

135. See *supra* notes 106-120 and accompanying text (discussing *Flaherty*).

136. See *supra* notes 128-129 and accompanying text (discussing the *Kirgan* requirements).

137. *Noble*, 344 Md. at 752-53, 709 A.2d at 1275.

138. *Id.* at 753, 709 A.2d at 1275-76.

139. *Id.* at 752-53, 709 A.2d at 1275.

began the analysis with a survey of the three major approaches used in various jurisdictions to determine when a plaintiff not in privity with an attorney may maintain a cause of action against him or her for professional malpractice.¹⁴⁰ Next, the court considered which of these theories should apply when a testamentary beneficiary sues the testator's attorney for professional malpractice.¹⁴¹

Although both beneficiaries suggested several alternative theories of recovery,¹⁴² the court held that in these particular cases, the traditional rule of strict privity would apply.¹⁴³ In arriving at this conclusion, the court first decided that the third party beneficiary exception to the strict privity requirement did not apply to the beneficiaries in this case.¹⁴⁴ The court reasoned that *Flaherty*, a case in which non-clients were permitted to maintain a cause of action against an attorney for malpractice under a third party beneficiary theory,¹⁴⁵ was

140. *Id.* at 738-50, 709 A.2d at 1268-74.

141. *Id.* at 751, 709 A.2d at 1274.

142. *Id.* at 751-52, 709 A.2d at 1275. The beneficiaries suggested a rule of foreseeability which would allow an attorney to predict the class of persons to whom he would be liable, and the scope of such liability, at the time of employment. Brief of Appellants at 36-38, *Noble v. Bruce*, 349 Md. 730, 709 A.2d 1264 (1998) (No. 7); *see also Noble*, 349 Md. at 751, 709 A.2d at 1275. The Fauntleroy beneficiaries offered several alternative theories. The first test would require the nonclient plaintiff to establish that "1) the plaintiff was a member of an identified class whose injury could be foreseen by a reasonable attorney exercising due care; 2) negligence was actually committed against the original client; and 3) there is no conflict between the plaintiff's claim and any interest or potential interest of the actual client." *Id.* at 751-52, 709 A.2d at 1275. The second alternative was derived from the *Restatement (Third) of the Law Governing Lawyers* § 73 (Tentative Draft No. 8, 1997), which provides that an attorney's duty is owed to a nonclient when:

(a) the lawyer knows that a client intends as one of the primary objectives of the representation that the lawyer's services benefit the non-client; and

(b) such duty would not significantly impair the lawyer's performance of obligations to the client, and the absence of such a duty would make enforcement of these obligations unlikely.

Noble, 349 Md. at 752, 709 A.2d at 1275 (quoting RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 73 (Tentative Draft No. 8, 1997)). The third alternative involved the "relational" approach as enunciated in an article by Professor Jay M. Feinman. Under this approach, "the beneficiary of a will should be permitted to prove that the 'testator intended to confer a benefit in the absence of proof in the will' and should not be precluded from doing so by a blanket rule such as the strict privity rule." *Id.* (quoting Jay M. Feinman, *Attorney Liability to Nonclients*, 31 TORT & INS. L.J. 735, 756 (1996)). The fourth alternative suggested the "agency" approach proposed by Professor Geoffrey C. Hazard, Jr., under which "the attorney is liable 'to a third person, directly or by way of subrogation to the right of the principal, for negligently or intentionally failing to carry out an undertaking on behalf of the principal that was intended to benefit the third person.'" *Id.* (quoting Geoffrey C. Hazard, Jr., *The Privity Requirement Reconsidered*, 37 S. TEX. L. REV. 967, 993 (1996)).

143. *Noble*, 349 Md. at 752, 709 A.2d at 1275.

144. *Id.* at 753, 709 A.2d at 1275-76.

145. *See supra* notes 106-120 and accompanying text (discussing *Flaherty*).

distinguishable from the present case because the beneficiaries in this case never met or communicated with the defendant attorneys, nor did they rely on representations made by the attorneys, as the plaintiffs had done in *Flaherty*.¹⁴⁶ Furthermore, the court disagreed with the beneficiaries' assertion that the third party beneficiary exception to the strict privity requirement was particularly suited to the area of will drafting and estate planning.¹⁴⁷ The court noted that in order for a nonclient to be considered a third party beneficiary of an attorney-client transaction, the client's intent to benefit the nonclient must be a direct purpose of the transaction, and stated that "[i]n cases involving wills, the beneficiary of a will is not necessarily the beneficiary of the attorney-client relationship."¹⁴⁸ The court instead assumed that the testator's primary intent is "to benefit themselves in planning their estates and in creating and maintaining their wills."¹⁴⁹

Next, the court briefly discussed the *Kirgan* case and its application to the present sets of facts.¹⁵⁰ The court did not fully adopt the reasoning of that case, but agreed with the pronouncement in *Kirgan* that extrinsic evidence is not admissible to show an intent on the part of the testator different from that expressed in the will.¹⁵¹ Although the Noble beneficiaries argued that this rule would not apply because they were not attacking the will, nor attempting to modify it, the court dismissed this contention.¹⁵² The court reasoned that, practically speaking, if the beneficiaries' claims were successful, the wills would be "rewritten" to exhibit an intent on the part of the testators in conformance with the beneficiaries wishes.¹⁵³

146. *Noble*, 349 Md. at 753, 709 A.2d at 1276. The court also noted that "[a] close reading of *Flaherty* also indicates the possibility that there was an assumption of duty by [the defendant attorney]. Here, however, there is no evidence that either Bruce or Henry undertook representation of the testators for estate planning on behalf of the beneficiaries." *Id.*

147. *Id.*

148. *Id.* at 754, 709 A.2d at 1276.

149. *Id.*

150. *Id.* at 754-55, 709 A.2d at 1276-77.

151. *Id.* at 755, 709 A.2d at 1276. The court noted that "[i]f extrinsic evidence were admitted, the potential for fraud and the risk of misinterpreting the testator's intent increase dramatically." *Id.*, 709 A.2d at 1277 (citing *Espinosa v. Sparber, Shevin, Shapo, Rosen & Heilbronner*, 612 So. 2d 1378, 1379 (Fla. 1993)).

152. *Id.*, 709 A.2d at 1277.

153. *Id.* The court also pointed out that the *Fauntleroy* case, if decided in favor of the beneficiaries, would clearly result in the reformation of the will. *Id.* The will would be rewritten so that no taxes would be paid out of the residuary estate, contrary to the specifications of the will. *Id.* at 755-56, 709 A.2d at 1277.

The court then explained the "compelling policy reasons"¹⁵⁴ for the application of the strict privity rule in these cases.¹⁵⁵ First, the court stated that the strict privity rule would "protect[] the integrity and solemnity of the will" by preventing the defendant attorney from being held liable for an additional bequest to the beneficiaries that was not expressed in the will.¹⁵⁶ Next, the court noted that the strict privity rule would protect the attorney-client relationship, reasoning that subjecting attorneys to liability to will beneficiaries would interfere with the "attorney's ability to fulfill his or her duty of loyalty to the client and compromise[] the attorney's ability to represent the client zealously."¹⁵⁷ Finally, the court asserted that the strict privity rule would protect attorney-client confidentiality.¹⁵⁸ The court explained that, although permitted under the Maryland Lawyer's Rules of Professional Conduct,¹⁵⁹ an attorney "should not be placed in the position where he or she would have to reveal a testator/client's confidences in an attorney malpractice action asserted by a nonclient beneficiary."¹⁶⁰ For example, a testator may wish to tell a certain person that he will be included in her will, while simultaneously instructing her attorney to exclude that person from her will.¹⁶¹ Therefore, the court found that permitting a cause of action by a non-client beneficiary in these situations might require the testator's attorney to reveal information that the client intended to keep confidential.¹⁶² The court concluded its opinion by briefly addressing the problem of attorney accountability, suggesting that while the non-client beneficiaries of a will would have no claim against the attorney drafting the will or providing estate planning advice, the testator's es-

154. *Id.* at 756, 709 A.2d at 1277.

155. *Id.* at 756-58, 709 A.2d at 1277-78.

156. *Id.* at 756, 709 A.2d at 1277.

157. *Id.* The court found that in the case of the Noble beneficiaries, there could be a potential conflict of interest between the testator and the beneficiaries because, although the beneficiaries wished to minimize taxes on the estate, the testator had legitimate reasons for not doing so. *Id.* at 756-57, 709 A.2d at 1277-78. Therefore, the attorney would be torn between complying with the wishes of the client not to minimize the taxes, and maximizing the estate to avoid liability on the part of the beneficiaries. *Id.* at 757, 709 A.2d at 1278.

158. *Id.* at 758, 709 A.2d at 1278.

159. Under the *Maryland Lawyer's Rules of Professional Conduct* Rule 1.6(b)(3), an attorney may disclose confidential information concerning representation of a client "to the extent the lawyer reasonably believes necessary . . . to respond to allegations in any proceedings concerning the lawyer's representation of the client." MD. LAWYER'S RULES OF PROFESSIONAL CONDUCT Rule 1.6(b)(3) (1988).

160. *Noble*, 349 Md. at 758, 709 A.2d at 1278.

161. *Id.*

162. *Id.*

tate may be able to meet the strict privity requirement and maintain such a cause of action.¹⁶³ The court also left open the possibility that a testator could maintain such a cause of action during his or her lifetime.¹⁶⁴

4. *Analysis.*—Fourteen years after the Court of Special Appeals answered with a “definite maybe” to the question whether a testamentary beneficiary would ever maintain a cause of action against the testator’s attorney for negligence,¹⁶⁵ the Court of Appeals in *Noble v. Bruce* responded with a clear “no.” At first glance, *Noble v. Bruce* may very well evoke a sympathetic response. The allegations of both the Noble and Fauntleroy beneficiaries appear highly speculative and, as the court pointed out, it is easy to recognize that the respective testators had very good reasons for structuring their wills in the way they did, despite the large tax consequences that were imposed as a result.¹⁶⁶ Furthermore, as the court correctly pointed out, strong policy reasons support limiting the liability of attorneys to nonclients.¹⁶⁷ However, upon closer examination, it becomes clear that in disposing of these cases in the manner that it did, the *Noble* court went a step too far. By refusing to recognize the Noble and Fauntleroy beneficiaries as third party beneficiaries of the will drafting agreement between the defendant attorneys and the testators, the court took an excessively harsh stance and failed to realize that the interests it sought to protect can be adequately protected without adopting such an extreme position.

a. *The Denial of the Third Party Beneficiary Exception in Cases Involving Wills in Maryland.*—Most jurisdictions embrace the position that specific, named beneficiaries of a will are third party beneficiaries of the contract to draft the will and can therefore sue the attorney who drafted it for professional malpractice.¹⁶⁸ Yet, in *Noble v. Bruce*, the Court of Appeals drew a clear line prohibiting will beneficiaries from recovering against an attorney who engages in negligent will drafting or estate planning. On the face of the opinion, it appears

163. *Id.* (citing *Espinosa v. Sparber, Shevin, Shapo, Rosen & Heilbronner*, 612 So. 2d 1378, 1380 (Fla. 1993)).

164. *Id.* at 759, 709 A.2d at 1278. The court noted, however, that in such situations damages “may be limited to the attorney’s fee.” *Id.*

165. *Kirgan v. Parks*, 60 Md. App. 1, 3, 478 A.2d 713, 714 (1984).

166. *Noble*, 349 Md. at 755-57, 709 A.2d at 1277-78.

167. *Id.* at 756-58, 709 A.2d at 1277-78.

168. See *supra* note 64 and accompanying text.

that the court limited its holding to the particular cases at bar.¹⁶⁹ A careful examination, however, reveals a much more dire prognosis. Initially, it is important to recognize that the *Noble* court's decision was based on the fact that both sets of plaintiff-beneficiaries were not third party beneficiaries of the contractual relationship between the testator and the drafting attorney.¹⁷⁰ Although the court phrased its reasoning in somewhat inconclusive terms,¹⁷¹ it begs the question: If these will beneficiaries are not third party beneficiaries of the contracts to draft their respective wills, then who is? The obvious answer is effectively "nobody." Both sets of beneficiaries were specifically included in the relevant wills by name.¹⁷² If specific, named beneficiaries cannot establish their status as third party beneficiaries, then it appears that no will beneficiary will be able to establish their status as such, absent some extrinsic proof, such as a document in which the attorney and testator expressly agree that the beneficiaries of the will are also "third party beneficiaries" of the contract to draft the will. Thus, the *Noble* court, although taking care not to specifically say so, created a de facto rule that no beneficiary of a will can maintain a cause of action against an attorney for malpractice under a third party beneficiary theory.¹⁷³

b. *Applicability of the Third Party Beneficiary Theory to Will Beneficiaries.*—The third party beneficiary theory, as it has developed as an exception to the strict privity requirement in attorney malpractice suits, seems particularly applicable to cases involving will beneficiaries. The primary rule in most jurisdictions, including Maryland, is that the client's intent to benefit the nonclient must be the direct purpose behind the transaction in order for a nonclient to be considered a third party beneficiary of the attorney-client transaction.¹⁷⁴ Several courts

169. See *Noble*, 349 Md. at 752, 709 A.2d at 1275 ("[W]e hold that the traditional rule of strict privity *applies in the instant cases*, and thus neither [set of beneficiaries] may maintain a malpractice action against the attorneys" (emphasis added)).

170. *Id.* at 753-54, 709 A.2d at 1275-76 ("[W]e must first dispose of the beneficiaries' assertion that they are third-party beneficiaries").

171. *Id.* at 754, 709 A.2d at 1276. The court stated that "[i]n cases involving wills, the beneficiary of a will is *not necessarily* the beneficiary of the attorney-client relationship." *Id.* (emphasis added).

172. *Id.* at 734-36, 709 A.2d at 1266-67.

173. More evidence of the absolute position taken by the court is found in a statement near the end of the opinion: "We agree . . . that 'the greater good is served by preserving a bright-line rule which denies a cause of action to all beneficiaries whom the attorney did not represent.'" *Id.* at 759, 709 A.2d at 1279 (quoting *Barcelo v. Elliot*, 923 S.W.2d 575, 578 (Tex. 1996)).

174. See, e.g., *Pelham v. Griesheimer*, 440 N.E.2d 96, 100 (Ill. 1982) ("We conclude that, for a nonclient to succeed in a negligence action against an attorney, he must prove that

recognize that the primary purpose behind a will is for the testator to dispose of his assets in a way that benefits certain individuals or organizations.¹⁷⁵ However, the *Noble* court reasoned that a testator's primary purpose in planning her estate and preparing a will is not necessarily to benefit others, but to benefit herself in disposing of her assets as she sees fit.¹⁷⁶ Although it is undoubtedly true that a person engages in estate planning to some extent for her own psychological benefit, it is illogical to presume that a testator who names specific beneficiaries in her will is not primarily motivated by an intent to benefit those people or organizations.¹⁷⁷ If there was no such purpose on the part of the testator, it seems strange that she would have any compulsion to prepare a will.¹⁷⁸ It is significant to note that in the cases examined above that accept a third party beneficiary rationale¹⁷⁹ as an exception to the privity requirement in attorney malpractice actions, none of those courts held that a named beneficiary of a will did not fall under this exception. This suggests the weakness in the *Noble* court's reasoning.

c. Policy Rationales in Support of Allowing Will Beneficiaries to Sue Attorneys in the Absence of Privity.—Looking beyond the technical

the primary purpose and intent of the attorney-client relationship itself was to benefit or influence the third party.”); *Noble*, 349 Md. at 753-54, 709 A.2d at 1276 (explaining that “the client’s intent to benefit the nonclient must be a direct purpose of the transaction or relationship in order for the nonclient to be considered a third party beneficiary”); *Flaherty v. Weinberg*, 303 Md. 116, 130-31, 492 A.2d 618, 625 (1985) (“[T]o establish a duty owed by the attorney to the nonclient the latter must allege and prove that the intent of the client to benefit the nonclient was a direct purpose of the transaction or relationship.”).

175. See *Lucas v. Hamm*, 364 P.2d 685, 688 (Cal. 1961) (in bank) (“Obviously the main purpose of a contract for the drafting of a will is to accomplish the future transfer of the estate of the testator to the beneficiaries named in the will, and therefore it seems improper to hold . . . that the testator intended only ‘remotely’ to benefit those persons.”); *Needham v. Hamilton*, 459 A.2d 1060, 1063 (D.C. 1983) (recognizing as “obvious” that the primary purpose of a contract for the drafting of a will is to effectuate a future transfer of assets from the testator’s estate to the named beneficiaries of the will); *Guy v. Liederbach*, 459 A.2d 744, 751 (Pa. 1983) (holding that a testamentary beneficiary could maintain a cause of action for attorney malpractice only after determining that “[t]he will . . . manifests the intent of the testator to benefit the legatee”).

176. See *Noble*, 349 Md. at 754, 709 A.2d at 1276. The court noted that a testator’s intent in preparing a will may be to prevent certain individuals who would otherwise inherit under their estate from doing so or to ensure that their assets did not pass intestate. *Id.*

177. See *Jenkins*, *supra* note 46, at 700 (“It stretches simple reason to pretend that the preparation of a will is not intended for the direct benefit of the named beneficiary.”).

178. *Cf. Guy*, 459 A.2d at 752 (“The circumstances which clearly indicate the testator’s intent to benefit a named legatee are his arrangements with the attorney and the text of his will.”).

179. See cases cited *supra* note 64.

issue of whether a will beneficiary is also a third party beneficiary, there are important policy considerations that bear on the issue of attorney liability to will beneficiaries. The *Noble* court's bright-line rule prohibiting nonclient will beneficiaries from recovering against the testator's attorney for malpractice under a third party beneficiary theory fails to withstand this policy-oriented scrutiny.¹⁸⁰

A primary reason for allowing will beneficiaries to bring malpractice claims against attorneys is that, absent such a right, an attorney has a carte blanche to commit negligence without the fear of penalty.¹⁸¹ It is critically important to impose liability on attorneys as a consequence of their negligence to assure that they represent their clients competently. If courts demand this degree of accountability from attorneys, attorneys will exercise increased care in planning estates and drafting wills.¹⁸² This focus on competence is particularly important considering recent trends in this area of the law. Instead of employing an attorney, many people with simple estate planning needs are turning to other resources such as paralegals and do-it-yourself materials.¹⁸³ Lawyers, therefore, are increasingly presented with complex estate planning and drafting issues.¹⁸⁴ This means that attorneys will be under more pressure to provide sound estate planning advice and will drafting skills, which will demand a higher level of competence.¹⁸⁵ Moreover, subjecting negligent attorneys to liability to nonclient testamentary beneficiaries will result in increased specialization.¹⁸⁶ An attorney who wishes to avoid liability may decide that

180. It is important to note that the *Noble* court would have been aware of many of these policy considerations, as they were set forth by the appellants in their brief to the court. See Brief of Appellants at 26-36, *Noble* (No. 7).

181. See *Lucas v. Hamm*, 364 P.2d 685, 688 (Cal. 1961) (en banc) (reasoning that if will beneficiaries are unable to recover from a loss resulting from the negligent drafting of the will, "no one would be able to do so, and the policy of preventing future harm would be impaired"); *Jenkins*, *supra* note 46, at 687 (arguing that the application of the strict privity rule to will beneficiaries has "suffered the creation of a legal right for which the law affords no remedy"); see also Brief of Appellants at 27, *Noble* (No. 7).

182. See *Schreiner v. Scoville*, 410 N.W.2d 679, 682 (Iowa 1987) ("[T]he potential for liability likely motivates the lawyer to draft and execute testamentary instruments with great care." (citing *Auric v. Continental Cas. Co.*, 331 N.W.2d 325, 329 (Wis. 1983))); see also Brief of Appellants at 31-33, *Noble* (No. 7); *Begleiter*, *supra* note 50, at 274-76 (discussing the positive impact that denying privity as a defense to legal malpractice actions has on attorney accountability).

183. See Michael P. Morley, Note, *Privity as a Bar to Recovery in Negligent Will-Preparation Cases: A Rule Without Reason*, 57 U. CIN. L. REV. 1123, 1139 (1989).

184. See *id.*

185. See *id.* ("The average will draftsman will need to be even more competent and careful if the remaining clientele is to be properly served.").

186. See *Begleiter*, *supra* note 50, at 276 (noting that malpractice concerns on the part of attorneys could lead to an increase in specialization).

the risks are not worth the benefit, and therefore cease providing wills and estates services to his or her clients. At the same time, the demand for attorneys who specialize in the area of wills and estates will rise. This move towards specialization will produce more competent lawyers and reduce the number of errors, thereby benefitting the public and improving the public image of lawyers.¹⁸⁷

To ensure accountability on the part of lawyers who negligently draft wills or provide negligent estate planning advice, it is necessary to allow suits by the beneficiaries who have been wronged by the negligent conduct. In addressing this point, the *Noble* court stated that although a will beneficiary could not file suit, the testator's estate may have standing to sue the attorney who drafted the will.¹⁸⁸ A number of courts have stated, however, that the testator's estate would not have standing to bring such a suit.¹⁸⁹ Even if the estate did have standing, it would have little incentive to bring suit because, as the *Noble* court recognized, the measure of damages would probably be limited to the fees paid to have the will drafted.¹⁹⁰

In addition to jeopardizing attorney competence, the *Noble* decision, by prohibiting nonclient testamentary beneficiaries from bringing attorney malpractice suits, precludes innocent parties from seeking a remedy for harm suffered through the fault of another.¹⁹¹

187. See *id.* at 277 (discussing polls in several states that indicate that the vast majority of those surveyed thought it "likely or very likely" that a specialist lawyer would be more efficient and provide better advice in the wills and estates area than nonspecialists).

188. *Noble*, 349 Md. at 758-59, 709 A.2d at 1278.

189. See, e.g., *Heyer v. Flaig*, 449 P.2d 161, 165 (Cal. 1969) (in bank). The court stated: Indeed, the executor of an estate has no standing to bring an action for the amount of the bequest against an attorney who negligently prepared the estate plan, since in the normal case the estate is not injured by such negligence except to the extent of the fees paid; only the beneficiaries suffer the real loss.

Id.; see also *Guy v. Liederbach*, 459 A.2d 744, 749 (Pa. 1983) ("In any cause of action for malpractice, some harm must be shown to have occurred to the person bringing suit. In the case of a failed legacy, the estate is not harmed in any way.").

190. See *Noble*, 349 Md. at 759, 709 A.2d at 1278 (admitting that if the testator's estate had a cause of action against the attorney, damages "may be limited to the attorney's fee"); see also *Schreiner v. Scoville*, 410 N.W.2d 679, 682 (Iowa 1987) (noting that the testator's estate will have "little incentive" to bring suit against an attorney for possible negligence).

191. See *Lucas v. Hamm*, 364 P.2d 685, 688 (Cal. 1961) (in bank) (concluding that imposing liability on attorneys on behalf of will beneficiaries did not place an undue burden on the legal profession, "particularly when we take into consideration that a contrary conclusion would cause the innocent beneficiary to bear the loss"); *Licata v. Spector*, 225 A.2d 28, 30 (Conn. C.P. 1966) ("Public policy would seem to favor the court's extending its equitable arm to assist innocent parties seeking just damages resulting from an error committed by another and affecting their rights, which error those innocent parties were never themselves able to correct."); *Schreiner*, 410 N.W.2d at 682 ("[I]f no cause of action could be maintained, the very purpose for which the lawyer was retained . . . would be frustrated without remedy." (citing *Biakanja v. Irving*, 320 P.2d 16, 19 (Cal. 1958) (in bank); *Need-*

One of the major goals of tort law is to assign liability to those at fault so that innocent parties will be compensated for harm they suffer.¹⁹² In situations involving negligent will drafting or estate planning advice, the blame falls squarely on the negligent attorney. At the same time, the beneficiaries of the will are the persons who suffer the direct harm from the attorney's negligence.¹⁹³ Failure to provide a remedy for the will beneficiaries against negligent attorneys thwarts these basic objectives of our tort system. Unfortunately, the *Noble* court apparently neglected to substantially weigh these considerations, as it imposed what amounts to an absolute barrier to suits by potentially innocent, yet harmed, will beneficiaries against negligent attorneys.¹⁹⁴ Moreover, malpractice insurance serves to protect attorneys against this type of risk, while the beneficiary harmed by the attorney's negligence has no such recourse.¹⁹⁵

d. Policy Arguments Favoring Retention of the Strict Privity Rule.—Courts advance a number of policy reasons for retaining the strict privity rule in cases involving will drafting and estate planning. The *Noble* court specifically addressed three and implicated several others.¹⁹⁶ However, none of these policy reasons are so compelling as to justify an absolute rule of strict privity in attorney malpractice cases involving negligent will drafting or estate planning. Instead, if prop-

ham v. Hamilton, 459 A.2d 1060, 1062 (D.C. 1983)); *Guy*, 459 A.2d at 752-53 ("[W]e feel persons who are named beneficiaries under a will and who lose their intended legacy due to the failure of an attorney to properly draft the instrument should not be left without recourse or remedy as they would if [lack of privity acted as a bar to these actions.]; see also Jenkins, *supra* note 46, at 688 ("Clearly the intended beneficiary, who has no vested right until the death of the client, cannot find redress for loss other than from the attorney who caused the loss.").

192. See *Barcelo v. Elliot*, 923 S.W.2d 575, 580 (Tex. 1996) (Cornyn, J., dissenting) (arguing that the majority, in maintaining privity as a requirement to attorney malpractice actions involving will beneficiaries, "gives no consideration to the fair adjustment of the loss between the parties, one of the traditional objectives of tort law." (citing W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 4, at 24-25 (W. Page Keeton ed., 5th ed. 1984); Robert E. Litan et al., *The U.S. Liability System: Background and Trends, in LIABILITY: PERSPECTIVES AND POLICY* 1, 3 (Robert E. Litan & Clifford Winston eds., 1988)).

193. See John H. Bauman, *A Sense of Duty: Regulation of Lawyer Responsibility to Third Parties by the Tort System*, 37 S. TEX. L. REV. 995, 1011 (1996) (arguing that extending liability to attorneys in these cases is appropriate because the fault lies solely with the negligent attorney, and, therefore, recognizing this duty "meets the goals of the tort system to deter wrongful conduct in an understandable way").

194. See *supra* notes 169-173 and accompanying text.

195. See Bauman, *supra* note 193, at 1011 (noting that the drafting attorneys are parties "well situated to insure against this risk").

196. See *Noble*, 349 Md. at 756-60, 709 A.2d at 1277-79 (noting that the strict privity rule protects "the integrity and solemnity" of the will, the attorney-client relationship, and attorney-client confidentiality).

erly limited, a third party beneficiary exception to the strict privity rule will ensure that the positive policy goals that mitigate in favor of providing a cause of action to will beneficiaries against negligent attorneys are fulfilled, without substantial negative side-effects.

Often, the main concern expressed regarding the ability of non-clients to bring malpractice suits against attorneys is the fear that an attorney's liability will be extended to a large number of unknown plaintiffs.¹⁹⁷ However, the third party beneficiary exception, properly applied, places clear and definite limits on the scope of an attorney's liability because the class of potential plaintiffs, as well as the amount of potential liability, is defined by the testator in advance.¹⁹⁸ Most jurisdictions applying the third party beneficiary exception in attorney malpractice actions require the plaintiff to demonstrate that the attorney and client intended to confer a direct benefit on him and state that an incidental benefit will not suffice.¹⁹⁹ In wills and estate cases, some courts have simply refused to allow plaintiffs not specifically

197. See *Savings Bank v. Ward*, 100 U.S. 195, 203 (1879) ("The only safe rule is to confine the right to recover to those who enter into the contract; if we go one step beyond that, there is no reason why we should not go fifty." (quoting *Winterbottom v. Wright*, 152 Eng. Rep. 109, 115 (Ex. 1842))); *Glover v. Southard*, 894 P.2d 21, 24-25 (Colo. Ct. App. 1994) ("We conclude . . . that it is in the public's best interest to protect attorneys from potentially unlimited liability to third parties Thus, in drafting testamentary instruments at the behest of a client, an attorney should not be burdened with potential liability to possible beneficiaries of such instruments." (citations omitted)); *Dickey v. Jansen*, 731 S.W.2d 581, 583 (Tex. App. 1987, writ ref'd n.r.e) ("It is obvious that opening attorney-client contracts to third party scrutiny would entail a vast range of potential liability." (citing Jack W. Show, Jr., Annotation, *Attorney's Liability, To One Other Than His Immediate Client, For Consequences of Negligence in Carrying Out Legal Duties*, 45 A.L.R.3d 1181, 1184-85 (1972))). Although the *Noble* court did not include this rationale in its primary discussion on the reasons to maintain the rule of strict privity with respect to will beneficiaries, it did mention it as one of the "public policy grounds" upon which courts often rely in applying the strict privity requirement. *Noble*, 349 Md. at 742, 709 A.2d at 1270.

198. See *Flaherty v. Weinberg*, 303 Md. 116, 131, 492 A.2d 618, 626 (1985) ("Properly applied, [the third party beneficiary] exception will not expose the attorney to endless litigation brought by those who might conceivably derive some indirect benefit from the contractual performance of the attorney and his client."); Bauman, *supra* note 193, at 1011 (explaining that "[t]he concerns of contract law are largely met because the risk here is well defined and knowable in advance" and "[t]he duty is owed to a limited group of known individuals"); see also *supra* Part 2.c (discussing the third party beneficiary exception to the strict privity requirement).

199. See, e.g., *Needham v. Hamilton*, 459 A.2d 1060, 1062-63 (D.C. 1983) ("[T]his duty [of care owed by a drafting attorney to a nonclient] does not extend to the general public but only to a nonclient who was the direct and intended beneficiary of the attorney-client relationship."); *Copenhaver v. Rogers*, 384 S.E.2d 593, 595-96 (Va. 1989) (noting that the party claiming the benefit under the third party beneficiary theory must show that the contract intended to confer the benefit on him).

identified as beneficiaries in the will to bring a cause of action.²⁰⁰ Even courts that allow claims by those not named in the will leave open the question whether the plaintiff would actually be able to establish that they are a third party beneficiary.²⁰¹ In *Noble*, the two sets of beneficiaries *were* specifically identified in the respective wills. Allowing such specifically identified beneficiaries to bring suit against an attorney with whom they are not in privity would certainly not expose that attorney to a large, unknown liability.²⁰²

The first policy reason specifically addressed by the *Noble* court was that the strict privity rule protects "the integrity and solemnity of the will."²⁰³ The court viewed these two suits as collateral attacks on the wills, essentially seeking their reformation.²⁰⁴ However, most authorities recognize that this analysis is not accurate because any suit for negligence filed by the beneficiaries of a will against the drafting attorney will not affect the scheme of distribution under the will.²⁰⁵ The will beneficiaries are simply claiming that if the attorney was not negligent, they would have received more than they did. The two actions, probate of the will, and a claim of negligence against the attor-

200. See *Espinosa v. Sparber, Shevin, Shapo, Rosen & Heilbronner*, 612 So. 2d 1378, 1380 (Fla. 1993) ("[W]e adhere to the rule that standing in legal malpractice actions is limited to those who can show that the testator's intent as expressed in the will is frustrated by the negligence of the testator's attorney."); *Schreiner v. Scoville*, 410 N.W.2d 679, 683 (Iowa 1987) (recognizing that the potential class of plaintiffs in will malpractice cases would be confined to "the direct, intended, and identifiable beneficiaries of an individual's testamentary instruments"); *Kirgan v. Parks*, 60 Md. App. 1, 12, 478 A.2d 713, 718-19 (1984) (noting that a cause of action against a testator's attorney for negligence in the drafting of a will can be brought only by an intended beneficiary).

201. See, e.g., *Teasdale v. Allen*, 520 A.2d 295, 296 (D.C. 1987) (refusing to adopt a *per se* rule that standing in attorney malpractice cases involving wills is limited to those whose status as beneficiaries could be discerned from the text of the will, but not deciding whether the particular plaintiffs would actually qualify as third party beneficiaries).

202. See *Jenkins*, *supra* note 46, at 692 ("Clearly the aspect of limitation to a specifically named legatee has appeal among those critics who would argue that the extension of third party beneficiary recovery to the wills area will result in 'a vast range of potential liability.'" (quoting *Dickey*, 731 S.W.2d at 583)).

203. *Noble*, 349 Md. at 756, 709 A.2d at 1277.

204. *Id.*

205. See *Ogle v. Fuiten*, 466 N.E.2d 224, 227 (Ill. 1984) (finding that even if the will beneficiary plaintiffs in this case were successful, "the orderly disposition of the testator's property is not disrupted, and the provisions of the wills, and the probate administration, remain unaffected"). One commentator has argued:

The negligence or breach of contract [action brought by the will beneficiary] involves the contract between the attorney and the testator to draft a will containing certain provisions, not the will ultimately drafted. The action does not affect the will as drafted and admitted to probate, nor does it remove property from the estate or force beneficiaries under the will to give up their legacies or pay damages.

Begleiter, *supra* note 50, at 204.

ney who drafted the will, are conceptually separate. If the will beneficiaries are successful in their malpractice claim, the damages will not be paid out of the corpus of the will, but will be satisfied by the attorney's malpractice insurance or from his or her own resources. Although the "effect" may be the same—as if the will had read differently—the will is not, in fact, altered, and the bequests are carried out as they are contained in the will. Moreover, as an added measure of protection, some courts, including the Court of Special Appeals in *Kirgan*,²⁰⁶ confine malpractice actions brought by will beneficiaries to situations where the intent of the testator, as it appears on the face of the will, was somehow frustrated by the defendant attorney's negligence.²⁰⁷ If a will beneficiary's cause of action is subject to this restriction, there can be no argument that the integrity of the will is being sullied, because the will clearly states what the testator intended. Although this restriction has been rejected by a number of courts and commentators that accept a third party beneficiary exception to the strict privity rule,²⁰⁸ it is significant to note that the *Noble* court could have satisfied its concern over the "solemnity of the will"²⁰⁹ by simply adopting the *Kirgan* reasoning. By applying the *Kirgan* rule, the *Noble* court could have disposed of these cases by stating that the testamentary intent on the face of the wills was valid, as opposed to erroneously suggesting that in order to prevent an attack on the integrity of the wills, it would be necessary to hold that no will beneficiaries could maintain a cause of action against a drafting attorney. This would involve recognizing the *Noble* and *Fauntleroy* beneficiaries as third

206. See *supra* notes 121-130 and accompanying text.

207. See, e.g., *Lorraine v. Grover, Ciment, Weinstein & Stauber, P.A.*, 467 So. 2d 315, 317-18 (Fla. Dist. Ct. App. 1985) ("Under the limited exception to the privity requirement, this court has held that an attorney's 'liability to the testamentary beneficiary can arise only if, due to the attorney's professional negligence, the testamentary intent, as expressed in the will, is frustrated, and the beneficiary's legacy is lost or diminished . . .'" (quoting *DeMaris v. Asti*, 426 So. 2d 1153, 1154 (Fla. Dist. Ct. App. 1983))); *Schreiner v. Scoville*, 410 N.W.2d 679, 683 (Iowa 1987) ("[W]e hold a cause of action ordinarily will arise only when as a direct result of the lawyer's professional negligence the testator's intent as expressed in the testamentary instruments is frustrated in whole or in part and the beneficiary's interest in the estate is either lost, diminished, or unrealized." (citing *Hiemstra v. Huston*, 91 Cal. Rptr. 269, 270-72 (Ct. App. 1970); *DeMaris*, 426 So. 2d at 1154; *Kirgan v. Parks*, 60 Md. App. 1, 12-13, 478 A.2d 713, 718-19 (1984))).

208. See, e.g., *Creighton Univ. v. Kleinfeld*, 919 F. Supp. 1421, 1426-27 (E.D. Cal. 1995) (concluding that the California Supreme Court would allow a will beneficiary to introduce extrinsic evidence to establish a testator's intent that is not apparent on the face of the will); *Begleiter*, *supra* note 50, at 201 (arguing that the basis of a malpractice action brought by a will beneficiary is the agreement to draft the will, and not the will itself, and because the agreement is almost always oral, extrinsic evidence is necessary to prove the terms of that agreement).

209. *Noble*, 349 Md. at 756, 709 A.2d at 1277.

party beneficiaries,²¹⁰ while ruling that they did not meet the necessary elements for a cause of action for legal malpractice because they did not allege the invalidity of the will, that the testamentary intent as expressed on the face of the will was not carried out, or that there was a concession of error on the part of the drafting attorney.²¹¹

A further policy concern advanced in support of the *Noble* court's holding was that the strict privity rule would protect the attorney-client relationship because subjecting attorneys to liability to will beneficiaries would conflict with the attorney's duty to represent his or her client loyally and zealously.²¹² This concern, however, makes little sense in the context of will drafting and estate planning. One of the primary reasons why courts downplay the conflict of interest concern in cases involving will drafting and estate planning is the essentially nonadversarial nature of these functions.²¹³ Zealous advocacy is not required in these situations because the interests of the testator and the will beneficiary are essentially similar—the testator wishes to dispose of his property in a way that names certain beneficiaries, and those beneficiaries wish to receive what the testator leaves them.²¹⁴ Moreover, the sole issue in an attorney malpractice suit is how well the attorney carried out his or her responsibility to the client.²¹⁵ If the attorney represents his or her client in a manner which conforms with the applicable standard of care, there is no basis for liability.²¹⁶ In-

210. See *supra* Part 4.b.

211. See *supra* notes 128-129 and accompanying text (discussing the *Kirgan* requirements).

212. *Noble*, 349 Md. at 756, 709 A.2d at 1277; see Brief of Appellee at 42-44, *Noble v. Bruce*, 349 Md. 730, 709 A.2d 1264 (1998) (No. 7).

213. The court in *Jewish Hospital v. Boatmen's National Bank*, 633 N.E.2d 1267 (Ill. App. Ct. 1994) stated:

Our supreme court has strongly embraced the concept that third-party-beneficiary status should be easier to establish when the scope of the attorney's representation involves matters that are nonadversarial, such as in the drafting of a will, rather than when the scope of the representation involves matters that are adversarial

Id. at 1276 (citing *Ogle v. Fuiten*, 466 N.E.2d 224, 227 (Ill. 1984); *Pelham v. Griesheimer*, 440 N.E.2d 96, 100 (Ill. 1982); *York v. Stiefel*, 458 N.E.2d 488 (Ill. 1983)).

214. See *Morley*, *supra* note 183, at 1136-37 ("In the will-preparation transaction, the interests of the client-testator and the named beneficiary are essentially congruent Both desire that the attorney draft an instrument which effectively transmits wealth from the client-testator's estate to the beneficiary." (footnote omitted)).

215. See *Bauman*, *supra* note 193, at 1011 ("The only issue is whether the attorney's representation met the standard of care of the profession in carrying out the client's desires.").

216. See *Hale v. Groce*, 744 P.2d 1289, 1292 (Or. 1987) ("Because negligence liability of this kind arises only from the professional obligation to the client, it does not threaten to divide a lawyer's loyalty between the client and a potentially injured third party"); *Bauman*, *supra* note 193, at 1011 ("[T]he will drafting situation is unique in eliminating

deed, it should be expected that an attorney will not take into account the interests of the beneficiaries separate from those of the client testator.

The *Noble* court's real concern appears grounded in a fear that attorneys will feel compelled to protect the interests of the will beneficiaries, which may conflict with the interests of the client testator, so as to not risk future liability in a suit that has no merit. However, if an attorney is confronted with a situation where he foresees that the testator's decision may cause him to be liable to the beneficiaries in the future, a simple solution is to record the client's wishes as evidence of the client's intent. Again, if the *Noble* court had adopted the *Kirgan* test,²¹⁷ it could have satisfied this policy concern without any need to apply the strict privity rule to all will beneficiary cases. If beneficiaries are restricted to malpractice suits based on the text of the will, the drafting attorney should have no reason to worry about a conflict of interest of situation. This is because, under the *Kirgan* regime, an attorney cannot be held liable for any bequests other than those that are actually incorporated into the will.²¹⁸ Therefore, an attorney need not be concerned about the interest of nonclients, because once the will is written and the testamentary intent as expressed on the face of the will is carried out, the duty to the testator client is satisfied, and the attorney is safe from liability.

Finally, the *Noble* court reasoned that applying the strict privity rule to will beneficiary cases would protect attorney-client confidentiality.²¹⁹ The court's reasoning, that suits by will beneficiaries may require an attorney to reveal confidential client information to defend themselves, appears sound.²²⁰ However, as a matter of policy, it is not sufficiently compelling to override the strong policy considerations that favor allowing suits by will beneficiaries.²²¹ This argument is supported by the Maryland Lawyer's Rules of Professional Conduct, which clearly allow an attorney in such a situation to reveal confidential client information if necessary to defend himself against allega-

concerns about conflicts of interest. . . . [a] claim by disappointed beneficiaries is nothing more than a claim that the lawyer failed to make the client's wishes effective.").

217. See *supra* notes 128-129 and accompanying text.

218. See *supra* notes 128-129 and accompanying text.

219. *Noble*, 349 Md. at 758, 709 A.2d at 1278; Brief of Appellee at 45-46, *Noble* (No. 7); see *supra* notes 158-162 and accompanying text.

220. *Noble*, 349 Md. at 758, 709 A.2d at 1278.

221. See *supra* Part 4.c (discussing the policy reasons for allowing will beneficiaries to proceed in attorney malpractice suits on a third party beneficiary theory).

tions of malpractice.²²² While it is regrettable to place an attorney in a position in which he must reveal confidential information to defend his own actions, it is a necessary evil in maintaining a system which tries to best allocate blame and compensate for harm done.

5. *Conclusion.*—In *Noble v. Bruce*, the Maryland Court of Appeals held that a testamentary beneficiary cannot maintain a cause of action for professional malpractice against the testator's attorney under the third party beneficiary exception to the strict privity rule.²²³ The effect of this holding is to categorically deny recovery for parties innocently harmed by the negligence of others, while at the same time allowing attorneys to act negligently without being held accountable. By relying on comparatively weak policy grounds, the *Noble* court has effectively thrown Maryland back into the dark age of strict privity with little hope for relief in sight.

MICHAEL N. KUNSELMAN

222. See MD. LAWYER'S RULES OF PROFESSIONAL CONDUCT RULE 1.6(b)(3) (1988) ("A lawyer may reveal [information relating to representation of a client] to the extent the lawyer reasonably believes necessary: to establish a defense to a criminal charge, civil claim, or disciplinary complaint against the lawyer . . ."). This exception to the attorney-client privilege was recognized by the *Noble* court. See *Noble*, 349 Md. at 758, 709 A.2d at 1278.

223. *Noble*, 349 Md. at 752-53, 709 A.2d at 1275.

II. CIVIL PROCEDURE

A. *Expanding Maryland Discovery and the Scope of the Uniform Contribution Among Tortfeasors Act*

In *Porter Hayden Co. v. Bullinger*,¹ the Court of Appeals held that a party should be permitted to obtain discovery of confidential settlement agreements between plaintiffs and other settling joint tortfeasors in order to determine their apportionment of damages under the Uniform Contribution Among Tortfeasors Act (UCATA).² The court also held that an entry of default against a settling party constitutes a finding of liability warranting classification of that party as a joint tortfeasor under UCATA.³ Thus, other nonsettling joint-tortfeasors are entitled to a reduction in contribution.

1. *The Case.*—The case involved two separate but related sets of facts.⁴ The first set of facts arose from the bankruptcy litigation of the Johns-Manville Corporation (Johns-Manville), which was later reorganized into the Manville Personal Injury Trust (Trust).⁵ The Trust was established to compensate all parties who had claims against the Trust.⁶ A national class action settlement was approved by the federal bankruptcy courts and district courts in New York which dictated the terms of the liability of the Trust for personal injury claims, including co-defendant contribution liability and its correlate, judgment reductions or set-offs.⁷ The settlement specifically stated the federal courts would determine the plaintiffs' set-offs.⁸ However, the district and bankruptcy courts excluded any claims arising in Maryland from the set-off provisions,⁹ delegating the decision to the Maryland courts.¹⁰ The Court of Appeals for the Second Circuit vacated that decision,

1. 350 Md. 452, 713 A.2d 962 (1998).

2. *Id.* at 459, 713 A.2d at 965 (holding that the "trial court erred in refusing to allow petitioners to inspect the amounts of the settlement agreements . . . and . . . vacat[ing] the trial court's judgment as to the apportionment of liability"). See MD. CODE ANN., CTS. & JUD. PROC. §§ 3-1401 to -1405 (1995 & Supp. 1997).

3. See *Porter Hayden*, 350 Md. at 455, 713 A.2d at 962 (holding that "the trial court and Court of Special Appeals erred in not treating [the settling defendant] as a tort-feasor").

4. *Id.*, 713 A.2d at 963.

5. *Id.*

6. *Id.*

7. See Brief of Appellant Porter Hayden Company at 7, *Porter Hayden Co. v. Bullinger*, 350 Md. 452, 713 A.2d 962 (1998) (No. 56).

8. *Porter Hayden*, 350 Md. at 456, 713 A.2d at 964.

9. *Id.*

10. *Id.*

and the lower courts were required to determine how Maryland would rule on the reduction.¹¹

In the meantime, several personal injury claimants sued Johns-Manville and other defendants associated with Johns-Manville in Baltimore City Circuit Court for damages resulting from asbestos-related diseases.¹² After a consolidated trial, a jury returned verdicts in favor of four of the plaintiffs.¹³ In its calculation of damages, the state court determined how set-offs should be applied.¹⁴ However, it made its calculation of damages prior to the decision on remand by the New York federal court.¹⁵ The co-defendants sought recalculation of the verdicts in light of the federal court's treatment of the issue, but the state court disregarded the federal court decision as to the appropriate set-off.¹⁶ Therefore, the instant case arose as to which set-off determination should apply.

a. The Johns-Manville Federal Actions.—In 1982, the Johns-Manville Corporation, the largest producer of asbestos and asbestos-containing products in the United States, filed for reorganization under Chapter 11 of the Bankruptcy Code.¹⁷ The reorganization resulted in the creation of the Trust, which assumed liability for all asbestos-related claims filed against Johns-Manville.¹⁸

In 1990, it became apparent that the trust was inadequately funded to compensate all possible beneficiaries.¹⁹ A national class action was created for all of the trust beneficiaries, including the appellees in the instant case, in order to supersede all state and federal court litigation pending against the Trust.²⁰ The plaintiff beneficiaries were entitled to settle with the Trust for whatever terms the Trust could provide.²¹ Unabated liability for contribution to co-de-

11. *Id.* at 457, 713 A.2d at 964.

12. *See id.* at 455-58, 713 A.2d at 963-65.

13. Brief of Amicus Curiae Manville Distributors Subclass at 10, *Porter Hayden Co. v. Bullinger*, 350 Md. 452, 713 A.2d 962 (1998) (No. 56).

14. *Id.* at 11.

15. *Id.*

16. *Id.*

17. *Porter Hayden*, 350 Md. at 455-46, 713 A.2d at 963-64 (explaining that the overwhelming number of persons claiming injury due to asbestos exposure forced the company into bankruptcy); *see also* Brief of Amicus Curiae Manville Distributors Subclass at 2, *Porter Hayden* (No. 56). Porter Hayden Company was a Maryland distributor of Johns-Manville products. *Id.* n.1.

18. *Porter Hayden*, 350 Md. at 455, 713 A.2d at 963.

19. *Id.* at 456, 713 A.2d at 963.

20. *Id.*

21. Brief of Appellant Porter Hayden Company at 6, *Porter Hayden* (No. 56).

fendants, however, would result in an insolvent Trust.²² Thus, the Trust was enjoined from fully funding the liability imposed by UCATA to limit contribution liability and to ensure the Trust's solvency.²³ A settlement agreement was eventually reached by the trust beneficiaries, but the Court of Appeals for the Second Circuit vacated the agreement.²⁴

Following remand, the trust beneficiaries reached a new settlement agreement.²⁵ The federal district courts for the Eastern and Southern districts of New York approved the new settlement, under which all claims against the Trust were to be removed from "the various tort systems" and processed under a Trust Distribution Process (TDP), which became the Trust's principal governing document.²⁶ The TDP categorized diseases resulting from exposure to asbestos and assigned corresponding monetary compensation values.²⁷ The TDP also outlined methods by which a co-defendant's set-off would be calculated in litigation involving trust beneficiaries.²⁸ However, the TDP expressly excluded all claims arising in Maryland with respect to the appropriate set-off provisions, providing for resolution of that issue by "the Courts."²⁹

The Second Circuit vacated the lower court's approval of the settlement with respect to the Maryland set-off issue and remanded the case to the district court.³⁰ On remand, the federal district court attempted to predict how the Maryland Court of Appeals would resolve the issue, holding that to determine the appropriate set-off, the courts were to "exclude the Trust from calculations of other settling defendants' pro rata shares, and . . . credit amounts settled by the Trust to

22. *Id.*

23. *Id.*

24. *Porter Hayden*, 350 Md. at 456, 713 A.2d at 964.

25. *Id.* at 457, 713 A.2d at 964.

26. *See id.* at 456, 713 A.2d at 964; Brief of Amicus Curiae The Manville Personal Injury Settlement Trust at 9, *Porter Hayden Co. v. Bullinger*, 350 Md. 452, 713 A.2d 962 (1998) (No. 56).

27. *Porter Hayden*, 350 Md. at 456, 713 A.2d at 964.

28. *Id.*

29. *Id.* The Stipulation of Settlement provided:

Section H.3 of the TDP, which deals with calculation of set-off, shall not apply by operation of this Stipulation with respect to asbestos health claims arising under Maryland law. The parties consent to trial by the Courts of the issue of appropriate set-off rules that should be developed with respect to Manville or the Trust in connection with claims arising under Maryland law.

Id. (quoting *In re Joint E. & S. Dist. Asbestos Litig.*, 878 F. Supp. 473, 578 (E.D.N.Y. & S.D.N.Y. 1995) (*Manville IV*), *aff'd in part, vacated in part*, 78 F.3d 764 (2d Cir. 1996) (*Manville V*)).

30. *See id.* at 457, 713 A.2d at 964.

joint tortfeasors who have not settled.”³¹ The federal district court’s determination of the Maryland set-off was rendered on June 10, 1996, after the Maryland trial court had rendered its decision on the issue.³² The issue on appeal is which set-off ruling should apply.

b. Personal Injury Actions in the State Courts.—In 1995, John Grimshaw,³³ Nick Zumas, Patrick McCaffery, Ethel Marie Granski, Casimir Balonis, and Frank Krueger each filed suit in the Circuit Court for Baltimore City against numerous defendants, each alleging that they contracted asbestos-related mesothelioma from either workplace or household exposure to the defendants’ products.³⁴ The court consolidated their suits for trial purposes.³⁵

Several of the defendants filed cross claims and impleaded third parties for contribution.³⁶ Porter Hayden, a defendant in this action, filed a third party contribution claim against Babcock & Wilcox Company (B&W).³⁷ At the same time, B&W entered into a settlement agreement with Grimshaw.³⁸ B&W, therefore, did not respond to Porter Hayden’s complaint or discovery requests.³⁹ In response, Porter Hayden filed a motion for entry of a default judgment against B&W.⁴⁰ The court granted Porter Hayden’s motion and entered a default judgment against B&W on August 30, 1995.⁴¹

Porter Hayden also impleaded the Johns-Manville Trust “for the sole purpose of obtaining a verdict reduction.”⁴² On December 21,

31. *Id.*

32. *Id.*

33. John Grimshaw died in January 1995. *Anchor Packing Co. v. Grimshaw*, 115 Md. App. 134, 147, 692 A.2d 5, 12 (1997), *vacated sub nom.* *Porter Hayden Co. v. Bullinger*, 350 Md. 452, 713 A.2d 962 (1998). His daughter, Barbara Bullinger, is the “personal representative of the Grimshaw estate.” *Porter Hayden*, 350 Md. at 459, 713 A.2d at 965; *Grimshaw*, 115 Md. App. at 147, 692 A.2d at 12.

34. *Grimshaw*, 115 Md. App. at 144, 692 A.2d at 10.

35. *Id.*

36. *See id.* at 144-45, 692 A.2d at 10-11.

37. *Porter Hayden*, 350 Md. at 457, 713 A.2d at 964.

38. *Grimshaw*, 115 Md. App. at 183, 692 A.2d at 29. The settlement between B&W and Grimshaw included a release agreement, which provided that “in order for Porter Hayden to be entitled to a decrease or pro rata reduction of the damages claimed by Grimshaw, it must be adjudicated that the releasees are joint tort-feasors.” *Id.*, 692 A.2d at 30. The *Grimshaw* court referred to this release agreement as a “*Swigert* type release.” *Id.*, 692 A.2d at 29; *see infra* notes 147-159 and accompanying text (discussing the nature of a *Swigert* release).

39. *Porter Hayden*, 350 Md. at 457, 713 A.2d at 964.

40. *Id.*

41. *Id.*

42. Brief of Amicus Curiae Manville Distributors Subclass at 10, *Porter Hayden* (No. 56). If Porter Hayden could obtain a judgment of liability against B&W, B&W would be classi-

1995, the jury returned verdicts in favor of the plaintiffs in the Zumas, McCaffery, Grimshaw, and Granski cases.⁴³

In reducing the jury verdicts to judgment, the court made statutory adjustments to the compensatory damages pursuant to the UCATA to reflect the settlements with the Manville Trust and other joint tortfeasors.⁴⁴ The court made these adjustments after considering reports submitted by the parties that contained proposals for final judgment.⁴⁵ The court reviewed these documents *in camera* and then sealed the reports.⁴⁶ The defendants moved to compel production of this information, but neither the court nor the opposing parties allowed the defendants to discover the settlement information.⁴⁷ On March 13, 1996, the trial court rendered final judgments without affording the defendants an opportunity to examine the settlement information.⁴⁸

The trial court's calculation of the final judgments was affected by two factors. First, though the court rendered default judgment against third party defendant and releasee B&W, it refused to classify B&W as a joint tortfeasor.⁴⁹ Porter Hayden, therefore, did not obtain a decrease or pro rata reduction of the damages entered in favor of Grimshaw.⁵⁰ Second, the circuit court rendered its decision before the federal district court decided the set-off issue.⁵¹

Porter Hayden and co-defendant Owens Corning filed motions pursuant to Maryland Rule 2-535 requesting recalculation of the final judgments in light of the federal district court ruling on set-off.⁵² Application of the federal rule would have resulted in an outcome more favorable to Porter Hayden.⁵³ The federal ruling held that the Trust

fied as joint tortfeasor. Thus, under the provisions of UCATA, Porter Hayden would be entitled to a reduction in the verdict.

43. *Porter Hayden*, 350 Md. at 458, 713 A.2d at 964.

44. *Anchor Packing Co. v. Grimshaw*, 115 Md. App. 134, 167, 692 A.2d 5, 21-22 (1996), *vacated sub nom. Porter Hayden Co. v. Bullinger*, 350 Md. 452, 713 A.2d 962 (1998).

45. *Id.* at 167-68, 692 A.2d at 22 (explaining that such statutory adjustments were aimed at preventing double recovery).

46. *Porter Hayden*, 350 Md. at 458, 713 A.2d at 964; *Grimshaw*, 115 Md. App. at 169, 692 A.2d at 22-23.

47. *Grimshaw*, 115 Md. App. at 168-69, 692 A.2d at 22.

48. *Porter Hayden*, 350 Md. at 458, 713 A.2d at 965.

49. *Id.* (explaining that the trial court would not "reduce Hayden's pro rata share of the judgment because it was not established that B&W was a joint tort-feasor" (quoting *Grimshaw*, 115 Md. App. at 185, 692 A.2d at 30)).

50. *Id.*

51. *Id.* at 457, 713 A.2d at 964.

52. Brief of Amicus Curiae The Manville Personal Injury Trust at 15, *Porter Hayden*. (No. 56).

53. Brief of Appellant Porter Hayden Company at 13-14, *Porter Hayden* (No. 56).

would not be counted as a joint tortfeasor when the amount of a pro rata share was calculated, and that plaintiffs' judgments should be reduced dollar for dollar by the amount of the Trust settlement.⁵⁴ Application of this rule would not allow the plaintiffs' judgments to be reduced by more than the amount of their Trust settlements, and the judgment against defendants would not increase as a result of the settlement between the plaintiff and the Trust.⁵⁵ Conversely, the Maryland ruling applied by the lower courts counted the Trust as a joint tortfeasor and treated the release as a pro tanto reduction in the verdict rather than a pro rata share.⁵⁶ Thus, under the Maryland rule, Porter Hayden would be forced to pay the Trust's portion that it was enjoined from funding and pay more to the plaintiffs than if the Trust had not been impleaded.⁵⁷

Despite the differing outcomes resulting from application of the different rules, the circuit court did not "exercise its revisionary powers."⁵⁸ The nonsettling defendants argued that they were forced to compensate the plaintiffs with a greater amount of damages than they would have had to pay if the Trust had not been impleaded as a result of the circuit court's resolution of the set-off issue.⁵⁹

Porter Hayden and co-defendants Anchor Packing and Owens Corning appealed the trial court's decision on several issues to the Court of Special Appeals.⁶⁰ The issues considered by the appellate court included, but were not limited to, the discoverability of the confidential settlement agreements, B&W's status as a joint tortfeasor, and whether the circuit court should have applied the set-off rules as determined by the federal court.⁶¹

The Court of Special Appeals held that the amounts of the settlement agreements were properly withheld from Porter Hayden and the other appellants.⁶² It rejected the appellants' arguments that access to the agreements should be granted because the information was de-

54. *Id.* at 13.

55. *Id.* at 14.

56. Brief of Amicus Curiae Manville Distributors Subclass at 11, *Porter Hayden* (No. 56).

57. *Id.*

58. *Anchor Packing Co. v. Grimshaw*, 115 Md. App. 134, 172, 692 A.2d 5, 24 (1997), *vacated sub nom. Porter Hayden Co. v. Bullinger*, 350 Md. 452, 713 A.2d 962 (1998).

59. See Brief of Amicus Curiae Manville Distributors Subclass at 11, *Porter Hayden* (No. 56).

60. See *Anchor Packing*, 115 Md. App. at 145-47, 692 A.2d at 11-12.

61. *Grimshaw*, 115 Md. App. at 146, 692 A.2d at 11; see *supra* notes 52-57 and accompanying text (explaining the difference between the set-off rule adopted by the federal court and that adopted by the Maryland circuit court).

62. *Grimshaw*, 115 Md. at 169, 692 A.2d at 22-23.

livered ex parte and used to adjudicate the defendant's liability.⁶³ The court first defined ex parte communication to mean "a communication about a case that an adversary makes to the decision maker without notice to an affected party."⁶⁴ It stated that ex parte communications occur when they are "taken or granted at the instance and for the benefit of one party only and without notice to or contestation by, any person adversely interested."⁶⁵ The court in determining that the settlement agreements were not delivered ex parte reasoned that both parties were given the opportunity to submit information to the court with regard to the settlement releases and proposed final judgments.⁶⁶ Thus, the appellants had notice that the materials were submitted to the court for review.⁶⁷ The court further concluded that the circuit court's refusal to produce the information submitted by the appellees did not prejudice the appellants because the latter already possessed the information necessary to calculate reductions under UCATA.⁶⁸ Ultimately, the court stated that the lower court properly reviewed the settlement agreements and properly applied the UCATA provisions to determine the set-offs.⁶⁹

With respect to the default judgment entered against B&W, the court affirmed the trial court's decision, holding that B&W was not to be considered a joint tortfeasor by reason of the default judgment entered against it.⁷⁰ The court rejected the appellants' argument that B&W's default judgment could substitute for an adjudication on the merits and render B&W a joint tortfeasor.⁷¹ The court interpreted UCATA Section 16(a), which defines joint tortfeasor, as prohibiting entry of default judgment from establishing B&W as jointly or severally liable in tort.⁷² It emphasized that only "a judicial determination of liability or nonliability settles the question of whether a cross-defendant is a joint tort-feasor under the UCATA."⁷³

63. *Id.* at 168, 692 A.2d at 22 (stating that "appellees' submissions were not ex parte . . . thus appellants' rights were not denied").

64. *Id.*

65. *Id.*

66. *Id.* at 169, 692 A.2d at 22.

67. *Id.*

68. *Id.*

69. *Id.*

70. *See id.* at 184, 692 A.2d at 30 (finding that "the default judgment does not establish that B&W is jointly or severally liable in tort for the same injury to [Grimshaw]" (alteration in original) (internal quotation marks omitted) (quoting MD. ANN. CODE art. 50, § 16 (1957))).

71. *Id.*

72. *Id.*

73. *Id.*

With respect to the conflict between the federal and state court decisions, the court noted that the Circuit Court for Baltimore City had "fundamental jurisdiction to adjust compensatory damages and issue a final judgment."⁷⁴ The court recognized that while the circuit court could refer to the federal court's conclusion, the ultimate decision rested with the circuit court.⁷⁵ Therefore, the court affirmed the circuit court's decision on the set-off issue.⁷⁶

Dissatisfied with the results, Porter Hayden and Owens Corning appealed, and the Court of Appeals granted certiorari to determine: (1) whether the circuit court had the authority to determine the application of co-defendant contribution claims when a federal court was to address the application of Maryland set-off principles in a pending federal class action proceeding involving the parties to the instant appeal;⁷⁷ (2) whether the trial court properly withheld from petitioners the amounts in the settlement agreements negotiated between the plaintiffs and other joint tortfeasors; and (3) whether a default judgment constitutes a finding of liability for purposes of application of the UCATA.⁷⁸

2. *Legal Background.*—

a. Discovery of Confidential Agreements in Maryland.—Maryland Rule 2-402 governs the scope of discovery in Maryland state courts.⁷⁹ It permits discovery of any matter relevant and not privi-

74. *Id.* at 173, 692 A.2d at 24 (defining "fundamental jurisdiction" as "the power residing in [a] court to determine judicially a given action, controversy, or question presented to it for decision" (alteration in original) (quoting *Pulley v. State*, 287 Md. 406, 415, 412 A.2d 1244, 1249 (1980))).

75. *See id.* at 172, 692 A.2d at 25 (stating that "[t]he trial court's conclusion was not dependent upon the conclusion reached in the federal court").

76. *Id.* at 175, 692 A.2d at 25.

77. The court in *Porter Hayden* ultimately vacated the trial court's apportionment of the damages among the joint tortfeasors. *Porter Hayden*, 350 Md. at 459, 713 A.2d at 965. Because the court remanded the decision, the federal court's apportionment decision predated the trial court apportionment of damages. *Id.* Thus, the trial court was required to apply the preclusive effect of the federal court action and the court did not need to answer this issue. *Id.*

78. *Id.* at 458-59, 713 A.2d at 965. Zumas and McCafferey settled with Owens Corning prior to oral arguments. *Id.* at 459, 713 A.2d at 965. Thus, Owens Corning appealed only the verdicts rendered against it in the *Granski* and *Grimshaw* cases. *Id.* Porter Hayden appealed only from the *Grimshaw* verdict. *Id.*

79. Maryland Rule 2-402 states, in relevant part:

A party may obtain discovery regarding any matter, not privileged, including the existence, description, nature, custody, condition, and location of any documents or other tangible things . . . if the matter sought is relevant to the subject matter involved in the action It is not ground for objection that the information sought is already known to or otherwise obtainable by the party seeking discovery

leged.⁸⁰ Many courts outside of Maryland, following a similar standard of discoverability, have determined that, in general, settlement agreements deemed confidential by the negotiating parties are discoverable if relevant to the subject matter of the action.⁸¹ They disagree, however, on the showing necessary to obtain discovery of the documents. In Maryland, courts have not addressed the discoverability of settlement agreements deemed confidential by the parties, but they have considered the discoverability of agreements deemed confidential by statute.⁸²

(1) *Other Jurisdictions.*—Various jurisdictions have established differing standards necessary to compel discovery of confidential settlement agreements. Some jurisdictions deem settlement agreements discoverable to the extent they are relevant.⁸³ Other jurisdictions look for a “particularized showing of a likelihood that admissible evidence will be generated by the dissemination of the terms of a settlement agreement.”⁸⁴ For example, in *Morse/Diesel, Inc. v. Fidelity & Deposit Co.*,⁸⁵ the defendant sought discovery of settlement agreements between the plaintiff and settling defendant.⁸⁶ The plaintiff, a general contractor for a construction project, sued the defendant sub-

or that the information will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

MD. RULE 2-402.

80. *See id.*

81. *See, e.g.,* *Young v. State Farm Mut. Auto. Ins. Co.*, 169 F.R.D. 72, 79 (S.D.W. Va. 1996) (mem.) (allowing discovery of relevant portions of confidential settlement agreements); *Collier Servs. Corp. v. Salinas*, 812 S.W.2d 372, 376 (1991) (stating that “the terms of a settlement agreement are properly discoverable under Tex. R. Civ. P. 166(b) (2) (f) (2)”); *In re New York County Data Entry Worker Prod. Liab. Litig. v. A.B. Dick Co.*, 616 N.Y.S.2d 424 (Sup. Ct. 1994) (stating that “discovery is permitted of evidence which is material, necessary, and relevant, and facts which will sharpen the issues at trial”).

82. *See Porter Hayden*, 350 Md. at 467, 713 A.2d at 969 (“Although this court has not examined the specific issue of whether a party may examine confidential settlement agreements, we have discussed a party’s ability to inspect other information deemed confidential where the confidentiality is created by statute.”).

83. *Perez v. State Indus. Inc.*, 578 So. 2d 1018, 1020 (La. Ct. App. 1991) (holding that information is admissible if it “appears reasonably calculated to lead to the discovery of admissible evidence [as] long as it is relevant to the subject matter”); *Ford Motor Co. v. Leggat*, 904 S.W.2d 643 (Tex. 1995) (stating that the Texas Rules of Civil Procedure allow discovery of settlement agreements to the extent they are relevant).

84. *See, e.g.,* *Botaro v. Hatton Assocs.*, 96 F.R.D. 158, 160 (E.D.N.Y. 1982) (mem.) (stating that the “strong public policy of favoring settlements . . . require[s] some particularized showing of a likelihood that admissible evidence will be generated by the dissemination of the terms of a settlement agreement”).

85. 122 F.R.D. 447 (S.D.N.Y. 1988).

86. *Id.* at 448.

contractor to recover money paid in excess of the subcontract.⁸⁷ The defendant counterclaimed for increased remuneration based on the extra work he had performed and for damages incurred due to the inability to accept other projects because of construction delays.⁸⁸ The defendant asserted that discovery of the settlement documents would lead to information concerning defendant's claims for increased compensation.⁸⁹ He proffered that the settlement documents would "cite increases in construction costs, or indicate other sources of such information" which would support his claim and even indicated specific instances where specific materials would emphatically show increase in construction costs.⁹⁰ The court held that the particularized showings of the appellant could reasonably lead to admissible evidence on the issue of damages caused by the construction delays.⁹¹ Thus, it allowed the appellant to inspect the settlement agreements.

Other courts have established standards to allow discovery of confidential settlement negotiations. The Second and Seventh Circuits require a heightened showing for the discovery of such negotiations. Their standard permits discovery of settlement negotiations during ongoing litigation only when the movant "lays a foundation by adducing from other sources evidence indicating that the settlement may be collusive."⁹²

In *Mars Steel Corp. v. Continental Illinois National Bank and Trust Co.*,⁹³ a class action co-defendant sought to discover settlement negotiations between plaintiff and a settling co-defendant.⁹⁴ The court noted that discovery of another party's settlement negotiations in an ongoing litigation is unusual because it allows one party to obtain information about an opponent's strategy.⁹⁵ In negotiations, a plaintiff might concede to certain weaknesses that a nonsettling co-defendant might use to its advantage during litigation.⁹⁶ Thus, the court applied a heightened discovery standard and ultimately found that the de-

87. *Id.*

88. *Id.*

89. *Id.* at 451.

90. *Id.*

91. *Id.*

92. See *Thornton v. Syracuse Sav. Bank*, 961 F.2d 1042, 1046 (2d Cir. 1992) (quoting *Mars Steel Corp. v. Continental Ill. Nat'l Bank & Trust Co.*, 843 F.2d 677, 684 (7th Cir. 1987)).

93. 834 F.2d 677 (7th Cir. 1987).

94. *Id.* at 679.

95. *Id.* at 684.

96. *Id.*

fendant failed to meet a showing of collusion during the negotiations, and barred the co-defendant from discovery.⁹⁷

Likewise, in *Thornton v. Syracuse Savings Bank*,⁹⁸ Syracuse, a co-defendant in a class action, was prevented from discovering the writings and documents relating to a settlement agreement entered into by a bank and investors.⁹⁹ On appeal to the Second Circuit, the court, citing *Mars Steel*, found that Syracuse did not show the "hanky panky" necessary to show "evidence indicating that the settlement may be collusive."¹⁰⁰ It concluded that in light of the fact that Syracuse had not met the heightened standard, the lower court did not abuse its discretion to limit the scope of discovery.

As indicated by the holdings of the Second and Seventh Circuits, courts will adhere to permitting discovery only when circumstances clearly indicate evidence of fraud between the negotiating parties.

(2) *The Maryland "Need to Inspect" Standard.*—In Maryland, courts have not addressed the discoverability of settlement agreements deemed confidential by the parties, but they have considered the discoverability of agreements deemed confidential by statute.¹⁰¹

The Court of Appeals addressed the issue of documents made confidential by statute in the criminal case of *Zaal v. State*.¹⁰² In *Zaal*, the defendant was charged with sexual abuse of his twelve-year-old granddaughter.¹⁰³ Because the two parties had opposing recollections of the events, the credibility of the witnesses played an important role.¹⁰⁴ In hopes of finding psychological disturbances on the part of the child (for purposes of cross examination), the defendant subpoenaed the victim's educational records from the Montgomery County Board of Education.¹⁰⁵ The Board, in response, moved for a protective order.¹⁰⁶ At the hearing on the motion for the protective order,

97. *Id.* (stating that "[s]uch discovery is only proper where the party seeking it lays a foundation by adducing from other sources of evidence indicating that the settlement may be collusive There is no indication of such hanky-panky here.").

98. 961 F.2d 1042 (2d Cir. 1992).

99. *Id.* at 1045. The settlement agreement stipulated that the investors agreed to pay 35% of the principal amount of the notes held by Syracuse and the investors' obligations to repay the remaining 65%. *Id.* at 1044. Syracuse alleged that as a result of this settlement with the investors, its claims became "subrogated to the investors' claims against another co-defendant to the extent of the 65% discharged." *Id.*

100. *Id.*

101. See *Porter Hayden*, 350 Md. at 467, 713 A.2d at 969.

102. 326 Md. 54, 602 A.2d 1247 (1992).

103. *Id.* at 61, 602 A.2d at 1250.

104. *Id.* at 62-63, 602 A.2d at 1251.

105. *Id.* at 62, 602 A.2d at 1251.

106. *Id.*

the court noted that Maryland regulates the disclosure of personally identifiable information from a student's education records.¹⁰⁷ Also, information may not be disclosed without consent of the parents. Therefore, the lower court refused the defendant access to the records and issued a protective order.¹⁰⁸

On appeal, Judge Bell, writing for the majority, held that the documents could be discovered if a "need to inspect" threshold had been crossed.¹⁰⁹ In a decision that provided useful guidelines, Judge Bell described the application of the claimant's "need to inspect."¹¹⁰ The *Zaal* court defined the "need to inspect" as "a reasonable possibility that review of the records would result in [the] discovery of usable evidence."¹¹¹ Thus, privacy interests could only be overcome by displaying a relationship "between the charges, the information sought, and the likelihood that relevant information [would] be obtained as a result of reviewing the records."¹¹² The *Zaal* court further indicated that the individual circumstances dictate whether a sufficient relationship exists. Thus, a proffer of relevance plays an important role.¹¹³ The more specific the proffer of relevance with respect to the information sought, the less likely the necessity for direct access to the records by the defendant or his representative.

The court provided examples to illustrate circumstances in which an issue is relevant and demonstrative of a need to inspect. If the issue in the case is one of identity, the educational files will not be relevant.¹¹⁴ But, if the evidence suggests that a stranger committed the offense, a proffer that inspection of the records can reveal a connection between the defendant and the victim will be relevant.¹¹⁵ The

107. *Id.*

108. *Id.* at 63, 602 A.2d at 1251.

109. *See id.* at 87, 602 A.2d at 1264.

110. *Id.* at 80, 602 A.2d at 1260 (stating that the threshold issues was . . . whether [claimant] established "the need to inspect").

111. *Id.* at 81, 602 A.2d at 1260.

112. *Id.* at 80-81, 602 A.2d at 1261. A "sufficient relationship" necessary to overcome privacy interests depended, in part, upon the moving party's proffer of relevance. *Id.* In *Zaal*, the court found that the defendant's "need to inspect" outweighed the privacy interests of the plaintiff. *Id.* at 82-84, 602 A.2d at 1261-62. The defendant proffered many legitimate evidentiary possibilities for the information contained in the records, such as demonstrating patterns of lying, acting out to gain attention, and bias. *Id.* at 83, 602 A.2d at 1261. Finding that the issue, credibility of the witness, could not be established without access to the records, the court allowed discovery of the documents. *Id.*, 602 A.2d at 1261-62.

113. *Id.* at 82, 602 A.2d at 1261 (stating that "whether a sufficient relationship exists is . . . dependent upon the circumstances, including the proffer of relevance").

114. *Id.*

115. *Id.*

court further reiterated that the more specific the information sought and existence easily determined, the less a need for direct access to the entire file existed, and an in camera review will suffice.¹¹⁶

When the *Zaal* court applied these factors, it determined that the issue was one of credibility.¹¹⁷ The defendant sought records to cross-examine the child's motivation, bias, and veracity.¹¹⁸ Thus, the defendant proffered the longstanding "antagonistic and hostile relationship" that existed between the defendant and the victim's father.¹¹⁹ He also proffered the possibility that the records would reflect a pattern of acting out to gain attention, or of lying, or other potentially damaging characteristics.¹²⁰

The *Zaal* court then weighed this information against the victim's privacy interest in her educational records to determine if the "need to inspect" threshold had been crossed.¹²¹ The court recognized that disclosure of the contents and subsequent extensive questioning about the records could compromise the victim's educational future.¹²² The court saw two alternatives: in camera review by the court alone or allowing unqualified access to the victim's records.¹²³

After consideration, the court stated that trial judges have the responsibility of fashioning remedies that account for both the rights of the accused and the protection of the victim's records.¹²⁴ Thus, the court held that in cases where the "need to inspect" threshold has been crossed, the court may elect to review the records alone, conduct the review in the presence of counsel, or review by counsel alone subject to certain restrictions required by the court to ensure confidentiality of the records.¹²⁵

Later that same year, the court extended the "need to inspect" standard in *Baltimore City Department of Social Services v. Stein*.¹²⁶ The plaintiffs in *Stein* sued the owner of the home in which they resided.¹²⁷ They alleged that the defendant's negligence proximately caused

116. *Id.*

117. *Id.* at 83, 602 A.2d at 1261.

118. *Id.*

119. *Id.*

120. *Id.*

121. *Id.*, 602 A.2d at 1262 (stating that "juxtaposed against petitioner's proffer is the victim's legitimate interest in the privacy of the contents of her educational records").

122. *Id.* at 83-84, 602 A.2d at 1262.

123. *Id.* at 84, 602 A.2d at 1262.

124. *Id.* at 86, 602 A.2d at 1263.

125. *Id.* at 87, 602 A.2d at 1264.

126. 328 Md. 1, 612 A.2d 880 (1992).

127. *Id.* at 3, 612 A.2d at 881.

their child's lead paint poisoning.¹²⁸ In hopes of finding evidence of behavioral problems on the part of the child prior to the alleged lead poisoning, the defendant sought records from the Department of Social Services to discover any information it had about the plaintiffs.¹²⁹ In response, the Department of Social Services filed a motion for protective order arguing that the records were statutorily confidential and could only be released pursuant to court order.¹³⁰ At the original hearing on the motion, the court denied access to the records and entered the protective order.¹³¹

The Court of Appeals framed the issue as "whether and to what extent, a state's interest in the confidentiality of its social services records must yield to a civil defendant's right to discover favorable evidence bearing on his threatened loss of property."¹³² In its analysis, the court relied heavily on its decision in *Zaal* and utilized the "need to inspect" standard.¹³³ Though *Zaal* was a criminal case, the court stressed that the plaintiffs in *Stein* sought to recover millions of dollars.¹³⁴ The court found that the seriousness of this particular cause of action paralleled that of a criminal case, thus the balancing of *Zaal's* "need to inspect" standard against the privacy interest of the plaintiff could be utilized.¹³⁵

The court reasoned that the issue of causation of the child's impairments was similar to the credibility issue in *Zaal*.¹³⁶ The only way the plaintiff in *Stein* could rebut the proximate cause argument would be to obtain information regarding past and present behavior of the child.¹³⁷ Access to the records would allow the trier of fact to assess whether certain behavior directly resulted from the lead poisoning.¹³⁸ The court also recognized that because the defendant had never seen the records and had no knowledge of their contents, the defendant's proffer of relevance and need to inspect was not overly specific.¹³⁹ Therefore, the court determined that the legitimate concerns gave plausibility to the defendant's need to review the records for relevant

128. *Id.*

129. *Id.* at 3-4, 612 A.2d 881-82.

130. *Id.* at 5, 612 A.2d at 881-82.

131. *Id.* at 6-7, 612 A.2d at 882.

132. *Id.* at 24, 612 A.2d at 893.

133. *Id.* at 26, 612 A.2d at 892 (stating that "our recent opinion in *Zaal v. State* . . . albeit a criminal case, is instructive").

134. *Id.* at 29-30, 612 A.2d at 894.

135. *Id.*

136. *Id.* at 30-31, 612 A.2d at 894-95.

137. *Id.* at 29-30, 612 A.2d at 894.

138. *Id.* at 30, 612 A.2d at 894.

139. *Id.*

information thereby crossing the “need to inspect threshold.”¹⁴⁰ The court, balancing the privacy interests of the plaintiffs, allowed review of the records to the extent that they revealed the child’s behavior during the relevant period in order to assist the trier of fact in determining the source of the child’s irregular behavior.¹⁴¹

b. Classifying a Party as a “Tortfeasor” Under the Maryland Uniform Contribution Among Tortfeasors Act.—At common law, if an injured party released one of several joint tortfeasors from liability, the remaining joint tortfeasors were released from liability as well.¹⁴² However, Maryland’s adoption of the Uniform Contribution Among Tortfeasors Act changed this. Under the UCATA, if a plaintiff enters into a release with a joint tortfeasor, a nonsettling joint tortfeasor is not automatically released, but may instead obtain a reduction in the verdict.¹⁴³

Under the UCATA, there is a right of contribution among two or more persons who are liable, jointly and severally, for the same tortious injury to the plaintiff. A pro rata release enables a plaintiff to settle with one or two (or more) defendants, and then proceed to trial against a nonsettling defendant.¹⁴⁴ The trial judge can then reduce the amount of any verdict for damages against nonsettling defendants

140. *Id.* at 31, 612 A.2d at 894.

141. *Id.*, 612 A.2d at 894-95.

142. *Swigert v. Welk*, 213 Md. 613, 619, 133 A.2d 428, 431 (1957).

143. MD. CODE ANN., CTS. & JUD. PROC. § 3-1404 (Supp. 1997). Section 3-1404 provides:

A release by the injured person of one joint tort-feasor, whether before or after judgment, does not discharge the other tort-feasors unless the release so provides; but reduces the claim against the other tort-feasors, or in any amount or proportion which the release provides that the total claim shall be reduced, if greater than the consideration paid.

It should be noted that the Maryland Uniform Contribution Among Joint-Tortfeasors Act, MD. ANN. CODE art. 50, §§ 16-20, was recodified as MD. CODE ANN., CTS. & JUD. PROC. §§ 3-1401 to -1409 (1995 & Supp. 1997). *Porter Hayden*, 350 Md. at 459, 713 A.2d at 962. Prior case history in this section based its discussions on the prior Maryland Annotated Code. For purposes of continuity in this Note, however, corresponding sections of CTS. & JUD. PROC. will be cited.

Prior MD. ANN. CODE	Current MD. CODE ANN.
Art. 50, § 16	= CTS. & JUD. PROC. § 3-1401
Art. 50, § 17	= CTS. & JUD. PROC. § 3-1402
Art. 50, § 18	= CTS. & JUD. PROC. § 3-1403
Art. 50, § 19	= CTS. & JUD. PROC. § 3-1404
Art. 50, § 20	= CTS. & JUD. PROC. § 3-1405

See Petitioners’ Brief at 4, *Porter Hayden Co. v. Barbara Bullinger*, 350 Md. 452, 713 A.2d 962 (1998) (No. 56).

144. See Peter B. Knapp, *Keeping the Pierringer Promise: Fair Settlements and Fair Trials*, 20 WM. MITCHELL L. REV. 1, 9 (1994).

by the settling defendant's pro rata share.¹⁴⁵ Thus, if a settling defendant's pro rata share is fifty percent and judgment is rendered against nonsettling defendants for \$100,000, the nonsettling defendants would only have to pay \$50,000.

In *Swigert v. Welk*,¹⁴⁶ the Court of Appeals created guidelines for classifying a party as a joint tortfeasor under section 3-1404 of the UCATA so that a nonsettling party may receive a reduction in the verdict.¹⁴⁷ In *Swigert*, the plaintiff, Evelyn Newport, a passenger in Harry Swigert's car, sued Swigert for damages resulting from a two car collision.¹⁴⁸ Welk, a third party, operated the other car.¹⁴⁹ Swigert pleaded Welk for contribution, but Welk obtained a release from Newport.¹⁵⁰ The release denied liability and provided for a mandatory pro rata reduction in total damages awarded to plaintiff.¹⁵¹ Welk claimed that the release barred any suit against him and moved for summary judgment. The trial court ruled in his favor and the defendant appealed the court's decision.¹⁵²

The court determined that Swigert had an extremely valuable right in retaining Welk in the case.¹⁵³ Since the UCATA does not indicate how to determine liability, the court deemed it necessary to determine Welk's negligence and contribution to the injuries "in one manner or another."¹⁵⁴ Even though the terms of the release dictated that Welk had no obligations to contribute to further damages, a determination of Welk's liability and subsequent classification as a joint tortfeasor would reduce Swigert's liability to plaintiff Newport in half.¹⁵⁵

To determine Welk's liability, the court established guidelines, which have subsequently been heavily relied upon.¹⁵⁶ It stated that "[t]he act does not specify the test of liability. Clearly something short

145. *Id.*

146. 213 Md. 613, 133 A.2d 428 (1957).

147. *Id.* at 619-22, 133 A.2d at 431-33.

148. *Id.* at 614-15, 133 A.2d at 428.

149. *Id.* at 615, 133 A.2d at 429.

150. *Id.* at 615-16, 133 A.2d at 429.

151. *Id.* at 618, 133 A.2d at 431.

152. *Id.* at 617, 133 A.2d at 430.

153. *Id.* at 621, 133 A.2d at 432.

154. *Id.* at 619, 133 A.2d at 431.

155. *Id.* at 621, 133 A.2d at 433 (referring to an identical case in Pennsylvania where "though [co-defendant] cannot recover contribution from the [settling] defendant, he does have an extremely valuable right in retaining [settling defendant] in the case, because, if the jury should find [settling defendant] to be a joint tortfeasor, [co-defendant's] liability to plaintiffs would be cut in half").

156. *Id.* at 619, 133 A.2d at 431.

of an actual judgment will suffice; we think it equally clear that a denial of liability will not.”¹⁵⁷ It reasoned that while “something short of an actual judgment” of liability does satisfy a party’s classification as a tortfeasor, a party must properly be cleared of any liability.¹⁵⁸ Thus, in circumstances, as in this case, where a party has been contractually deemed “not liable” and “not a joint tortfeasor,” the mere denial of this liability does not obviate the need to actually determine the party’s liability.

For nearly two decades after the establishment of the *Swigert* guidelines, classification of a settling defendant as a joint tortfeasor through a trial on the merits and a subsequent determination by a fact finder was the only method available in Maryland for a nonsettling defendant to obtain a reduction in the verdict pursuant to section 3-1404.¹⁵⁹ In *Jones v. Hurst*,¹⁶⁰ however, the Court of Special Appeals held that a release could classify a settling defendant as a joint tortfeasor which would operate to reduce the liability of the nonsettling tortfeasors under the UCATA.¹⁶¹

In *Jones*, an automobile owned and operated by Beverly Jones was struck in the rear by an automobile operated by Zachary Hurst and owned by Henry Hurst.¹⁶² Jones sued the Hursts for personal injuries.¹⁶³ Zachary Hurst alleged that brake failure caused the accident and filed a separate suit against General Motors Corporation.¹⁶⁴ The two cases were consolidated for trial.¹⁶⁵ Jones settled her case against General Motors pursuant to a release which denied liability, but was

157. *Id.*

158. *Id.*

159. *See, e.g., Brooks v. Daley*, 242 Md. 185, 193, 218 A.2d 184, 188 (1966) (holding that a joint release entitled a nonsettling defendant to a partial reduction in the verdict when settling co-defendant was found liable for injury to plaintiff). It is important to note that the federal courts had already determined that a release could identify a party as a joint tortfeasor thereby eliminating the need for a determination of the settling defendant’s liability in order for nonsettling defendants to get reduction in verdict. *See, e.g., Mazer v. Security Ins. Group*, 507 F.2d 1338, 1342 (3d Cir. 1975) (“[T]he joint tortfeasor status of a settling party could . . . be established not only by a judgment but also by a provision in the joint tortfeasor release in which the injured party acknowledges that in any lawsuit the verdict will be reduced to the extent agreed upon.” (citing *Griffin v. United States*, 500 F.2d 1059 (3d Cir. 1974))).

160. 54 Md. App. 607, 459 A.2d 219 (1983).

161. *See id.* at 612, 459 A.2d at 223 (holding that “a release agreement of the kind involved here would bring a case within the provision of the Uniform Contribution Among Tort-Feasors Act”).

162. *Id.* at 609, 459 A.2d at 220.

163. *Id.*

164. *Id.*

165. *Id.*, 459 A.2d at 221.

captioned "JOINT TORT-FEASOR RELEASE."¹⁶⁶ The release also provided that "General Motors Corporation shall be considered as joint tort-feasors."¹⁶⁷

The court applied the *Swigert* guidelines to allow for the settling defendant's contractual classification as a joint tortfeasor. In its application of the *Swigert* guidelines, the court reasoned that the settling defendant's denial of liability in its pre-negotiated joint tortfeasor release could not override its concession as a joint tortfeasor.¹⁶⁸ The contract which classified the party as a joint tortfeasor qualified as "something short of an actual judgment" sufficient to classify a party as a joint tortfeasor.¹⁶⁹ Therefore, determination of the party as a joint tortfeasor allowed for a reduction in the nonsettling defendant's verdict pursuant to the UCATA.¹⁷⁰

Following the *Jones* decision, Maryland courts continued to expand and clarify the methods available to classify a settling party as a joint tortfeasor. In *Allgood v. Mueller*,¹⁷¹ the Court of Appeals considered whether to permit a nonsettling defendant to obtain a reduction in the verdict despite the existence of a release obtained by the settling parties which classified the parties as "joint tortfeasors," but stated that the release could not be construed as an admission of liability in tort unless the settling parties were judicially determined liable.¹⁷²

In *Allgood*, plaintiff brought suit against a physical education class teacher, the principal of the middle school, the Board of Education of St. Mary's County, and Jayfro Corporation for injury to her child on the school premises.¹⁷³ During the trial, the three parties affiliated with the school settled for \$75,000 and signed a release captioned "JOINT TORT-FEASORS RELEASE AND INDEMNIFICATION AGREEMENT."¹⁷⁴ Despite the caption of "joint tortfeasor," however, a provision of the release stated that the release should not be consid-

166. *Id.*

167. *Id.* at 610, 459 A.2d at 221.

168. *See id.* at 611, 459 A.2d at 222 (stating that the release was sufficient for purposes of satisfying the *Swigert* guidelines).

169. *See id.* (applying the rule in *Swigert* that "something short of an actual judgment will suffice [to classify a party as a joint tortfeasor]" and finding the "release sufficient for that purpose").

170. *Id.* at 613, 459 A.2d at 223 (holding that "a release agreement of the kind involved here would bring a case within the provision of the Uniform Contribution Among Tortfeasors Act").

171. 307 Md. 350, 513 A.2d 915 (1986).

172. *Id.* at 357-58, 513 A.2d at 919.

173. *Id.* at 353, 513 A.2d at 917.

174. *Id.*

ered an admission of liability and that recovery of damages from Jayfro could only be reduced if any of the settling defendants were found jointly liable to the Plaintiff.¹⁷⁵ The court proceeded with the trial and the jury ultimately returned a verdict only against Jayfro.¹⁷⁶ Jayfro moved to reduce the verdict by the amount paid by the settling defendants who had signed the joint tortfeasor release.¹⁷⁷

The *Allgood* court recognized that the conditional terms of the release distinguished the release used in *Jones*.¹⁷⁸ The *Allgood* release only conditionally promised to reduce the judgment against Jayfro if the settling parties were adjudicated as joint tortfeasors, whereas the *Jones* release classified the settling party as a liable joint tortfeasor for purposes of reduction under UCATA.¹⁷⁹ The *Allgood* court underscored that a release alone is not an absolute admission by any party that a payer was negligent.¹⁸⁰ The court further emphasized that any party to the suit has a right to submit the question of negligence and liability.¹⁸¹ And in this case, where the settling parties were adjudicated as nontortfeasors and held not liable, the conditional terms of the release had not been met.¹⁸² Thus, the defendant could not receive a reduction in the verdict, and the plaintiff was entitled to both the settlement amount and the amount of damages rendered against Jayfro.¹⁸³

As can be seen, in Maryland, the rights of a nonsettling party depend upon the settling party's classification as a joint tortfeasor under the UCATA as well as the types of releases entered into by the settling parties. Using the guidelines set out in *Swigert*,¹⁸⁴ a released party who denies liability as a joint tortfeasor cannot obviate the need for a judicial determination as to its status as "non-liaible." However, "something short of an actual judgment" can determine liability.¹⁸⁵ Thus, releases play an important role in the classification of a party as a joint tortfeasor. Settling parties who agree to classification as a joint

175. *Id.* at 354, 513 A.2d at 917.

176. *Id.* The court did not inform the jury about the settlement. *Id.* at 357, 513 A.2d at 919.

177. *Id.* Jayfro asserted that the defendants remained in the case solely for the purpose of determining that amount of damages recoverable by the plaintiff and not for determining the settling parties' liability in tort.

178. *Id.* at 358, 513 A.2d at 919.

179. *Id.*

180. *Id.*

181. *Id.*

182. *Id.*

183. *Id.* (holding that Jayfro Corporation must pay the costs).

184. See *supra* notes 147-160 (discussing the *Swigert* guidelines and their application).

185. *Allgood*, 307 Md. at 357, 513 A.2d at 919.

tortfeasor in their release are considered liable, and the nonsettling parties will be entitled to a reduction under UCATA.¹⁸⁶ If the release is conditional, then a nonsettling party must have the settling parties' liability judicially determined.¹⁸⁷

3. *The Court's Reasoning.*—In *Porter Hayden Co. v. Bullinger*, the Court of Appeals addressed two issues.¹⁸⁸ First, the court considered whether the trial court improperly refused the appellants access to the settlement agreements negotiated between the plaintiffs and the released defendants.¹⁸⁹ Second, the court considered whether a default judgment constitutes a finding of liability for purposes of applying section 3-1404 of the UCATA.¹⁹⁰

With respect to the first issue, a unanimous court held that the trial court erred in failing to require disclosure of the negotiated settlement agreements.¹⁹¹ With respect to the second issue, the court ruled that the default judgment entered against B&W on Porter Hayden's third party claim constituted a determination of liability, and thus classified B&W as a joint tortfeasor for purposes of section 3-1404 of the UCATA.¹⁹²

a. *Disclosure of Confidential Settlement Agreements.*—In reaching its decision, the *Porter Hayden* court first looked to the general purpose and scope of discovery under the Maryland Rules.¹⁹³ Relying on Maryland case law, the court noted that the purpose of the discovery rules was to "require disclosure of *facts* by a party litigant to all of his adversaries, and thereby to eliminate, as far as possible, the necessity of any party to litigation going to trial in a confused or muddled state of mind."¹⁹⁴ The court stated that the discovery rules are broad in scope and liberally construed to accomplish their purpose.¹⁹⁵

The court examined the evidentiary concept of privilege after noting that "[u]nder the general discovery rule, a party may obtain

186. See *supra* notes 161-171 and accompanying text.

187. See *supra* note 172 and accompanying text.

188. *Porter Hayden*, 350 Md. at 455, 713 A.2d at 963.

189. *Id.* at 459-69, 713 A.2d at 965-70.

190. *Id.* at 469-73, 713 A.2d at 970-72.

191. *Id.*

192. *Id.* at 472-73, 713 A.2d at 972. Judge Rodowsky filed a dissenting opinion on the default issue. *Id.* at 474-84, 713 A.2d at 973-78.

193. *Id.* at 459-61, 713 A.2d at 965 (examining the "very broad" scope of discovery under Maryland Rule 2-402(a)).

194. *Id.* at 460, 713 A.2d at 965-66 (quoting *Baltimore Transit Co. v. Mezzanotti*, 227 Md. 8, 13, 174 A.2d 768, 771 (1961)).

195. *Id.*, 713 A.2d at 966.

discovery of information that is relevant and not privileged.”¹⁹⁶ Reflecting on the privileges accorded by the United States Constitution, the Maryland Constitution, statutes, and common law, the court found no privilege protecting the settlement agreements from disclosure.¹⁹⁷ The court then focused its attention on the relevance of the information sought by petitioners.¹⁹⁸ The court noted that at the pre-trial stage, the amounts of the settlement agreements would have been irrelevant.¹⁹⁹ Yet “once the verdicts were rendered against petitioners, the amounts of the settlement agreements became relevant in determining the apportionment of damages as to petitioners under the [UCATA].”²⁰⁰ This ripened relevancy caused the settlement agreements to become more vulnerable to discovery requests.²⁰¹

Finally, the *Porter Hayden* court analyzed whether settlement agreements, deemed confidential by the parties that negotiated them, “are discoverable.”²⁰² Recognizing this as an issue of first impression in Maryland, the court first reviewed decisions of other jurisdictions.²⁰³ The court examined federal court opinions which found settlement agreements discoverable if they were relevant.²⁰⁴ A review of pertinent state court decisions from other jurisdictions also revealed that settlement agreements, deemed confidential by the parties who negotiated them, were discoverable.²⁰⁵ It also reviewed discovery of confidential settlement negotiations which generally required a “more particularized showing that evidence sought was relevant and calculated to lead to discovery of admissible evidence.”²⁰⁶ The court then reviewed prior case law in Maryland. It used the standard applied to determine if parties could inspect other types of information deemed confidential by statute to ultimately determine that inspection of the relevant portions of the settlement agreement was permissible.

196. *See id.*

197. *Id.* at 460-61, 713 A.2d at 966 (stating that the “[r]espondents have asserted no privilege pertaining to the amounts of the settlement agreements they negotiated with other potentially responsible parties”).

198. *Id.* at 461, 713 A.2d at 966.

199. *Id.*

200. *Id.*

201. *Id.* at 460, 713 A.2d at 966 (explaining that information must be relevant, as well as unprivileged, in order to be discoverable).

202. *Id.* at 461, 713 A.2d at 966.

203. *See id.* (stating that “[c]ourts outside of Maryland have had the opportunity to address the issue of whether settlement agreements, deemed confidential by the parties that negotiated them, are discoverable”).

204. *Id.* at 461-64, 713 A.2d at 966-68.

205. *Id.* at 464-65, 713 A.2d at 968-69.

206. *Lesal Interiors v. Resolution Trust Corp.*, 153 F.R.D. 552, 562 (D.N.J. 1994).

With no prior case law on point in Maryland, the court applied the "need to inspect standard," utilized in *Zaal* and *Stein*, to determine whether the confidential settlement agreements could be discovered.²⁰⁷ The court reasoned that though in those two cases, the documents in question were deemed confidential by statute, "[t]here certainly would be no greater standard, and there may be significantly less of a standard, where there is no statutory basis for the claims of confidentiality, as in this case."²⁰⁸ The court held that petitioners crossed the threshold of "a reasonable possibility that review of the [settlement agreements] would lead to discovery of usable evidence."²⁰⁹ The court underscored the fact that the particular amounts of the settlement agreements were utilized by the trial court to determine final judgments against each petitioner.²¹⁰ Thus, the petitioners needed to inspect portions of the settlement agreement relevant to determine whether, and how much, judgments might be affected by (1) the settling defendant's classification as a tortfeasor or nontortfeasor; (2) whether the release was pro tanto or pro rata; and (3) the consideration paid for the release.²¹¹ Accordingly, the court concluded that the trial court acted improperly in withholding this information.²¹² The court vacated the trial judge's apportionment of damages and remanded the case for further proceedings.²¹³

b. Expanding the Definition of "Tortfeasor."—Under the Maryland UCATA, a "release by the injured person of one joint tort-feasor . . . reduces the claim against the other tort-feasors in the amount of the consideration paid for the release or in any amount or proportion by which the release provides that the total claim shall be reduced, if greater than the consideration paid."²¹⁴ The lower court, however, did not apply this provision of the UCATA and refused to reduce the

207. *Porter Hayden*, 350 Md. at 467-68, 713 A.2d at 969-70; see *supra* notes 102-141 and accompanying text (discussing the "need to inspect" standard in *Zaal* and *Stein*).

208. *Porter Hayden*, 350 Md. at 468, 713 A.2d at 970.

209. *Id.* (quoting *Zaal v. State*, 326 Md. 54, 81, 602 A.2d 1247, 1260 (1992)).

210. *Id.* at 469, 713 A.2d at 970.

211. *Id.* at 468-69, 713 A.2d at 970 (finding the petitioners demonstrated a "need to inspect" the settlement agreement to determine "whether, and how much, the judgments against them might be affected by (1) the way in which the agreement classified the settling defendant, i.e., tortfeasor or nontort-feasor, (2) whether a pro tanto or pro rata release was intended, and (3) the amount paid for the release").

212. *Id.* The court emphasized that nondisclosure of the settlement agreements was inappropriate, but it also cautioned against total disclosure, which might also be inappropriate, depending on the circumstances. *Id.*

213. *Id.*

214. *Id.* at 470, 713 A.2d at 970 (omission in original) (quoting MD. CODE ANN., CTS. & JUD. PROC. § 3-1404 (Supp. 1997)).

judgment against Porter Hayden,²¹⁵ failing to equate the default judgment entered against the impleaded third party, B&W, with a classification of B&W as a joint tortfeasor for purposes of the UCATA.²¹⁶

The *Porter Hayden* court recognized “that there ha[d] been no determination by a fact finder as to B&W’s liability.”²¹⁷ The court also acknowledged that the terms of the release did not classify B&W as a joint tortfeasor for purposes of the UCATA.²¹⁸ Therefore, the court was forced to decide whether the default judgment entered against B&W on Porter Hayden’s third-party claim constituted a determination of B&W’s liability.²¹⁹ In addition, if the court found that B&W was indeed liable, it needed to assess whether this liability established B&W as a joint tortfeasor for purposes of reducing Porter Hayden’s verdict pursuant to section 3-1404 of the UCATA.²²⁰

In resolving the first issue, the court focused on its decision *Curry v. Hillcrest Clinic, Inc.*,²²¹ in which it explained the effect of a default judgment.²²² The court noted that in *Curry*, it described a default judgment as “more akin to an admission of liability.”²²³ The court reviewed Maryland cases dating back to 1936 that were consistent with the *Curry* court’s reasoning that “judgment by default is as binding as any other judgment and establishes the liability of the defendant to the plaintiff.”²²⁴ Therefore, the court concluded that the default judgment entered against B&W should constitute an admission of liability by B&W.²²⁵

To determine if “this admission of liability [was] sufficient to establish B&W as a joint tort-feasor,” the court applied the guidelines created in *Swigert* and concluded that “[a]lthough no determination as to B&W’s liability was made by a judge or jury,” B&W’s admission of liability was sufficient to establish B&W as a joint tortfeasor.²²⁶ The court found further support for its conclusion in the fact that the underlying goal of the Maryland Rules and the UCATA was “to try in

215. *Id.* at 469, 713 A.2d at 970.

216. *Id.* at 469-70, 713 A.2d at 970.

217. *Id.* at 471, 713 A.2d at 971.

218. *Id.*

219. *Id.*

220. *Id.*

221. 337 Md. 412, 653 A.2d 934 (1995).

222. *Porter Hayden*, 350 Md. at 472, 713 A.2d at 971.

223. *Id.* at 472, 713 A.2d at 971 (quoting *Curry v. Hillcrest Clinic, Inc.*, 337 Md. 412, 434-36, 653 A.2d 934, 945 (1995)).

224. *Id.*, 713 A.2d at 972 (quoting *Associated Transp. v. Bonoumo*, 191 Md. 442, 445-46, 62 A.2d 281, 283 (1948)).

225. *Id.* at 473-74, 350 Md. at 972.

226. *Id.*

one action all phases of [the] litigation.”²²⁷ If the court allowed the trial court to enter a judgment against Porter Hayden without accounting for the reduction in verdict due to B&W’s contribution as a tortfeasor, the trial court would have left open an unresolved issue requiring further litigation.²²⁸ Accordingly, the Court of Appeals held that the lower court erred in not classifying B&W as a joint tortfeasor and in not reducing the amount of damages pursuant to section 3-1404 of the UCATA.²²⁹

4. *Analysis.*—The *Porter Hayden* court determined two issues brought on appeal. First, the court established that parties can discover relevant portions of the settlement agreement despite party created confidentiality. Though the court properly recognized the issue and made the proper decision, it arrived at this decision through extension of a “need to inspect” standard used in prior case law. In so doing, the court failed to create the minimum standard that will allow courts to determine whether to allow discovery of confidential settlement agreements. Second, the court determined that a default judgment can substitute for adjudication as a tortfeasor for purposes of reduction under the UCATA. This decision was proper because it is consistent with the well established guidelines set forth in *Swigert* and because it upheld the policy goals of the Maryland UCATA, to prevent double recovery.

a. *Discovery of Confidential Settlement Agreements.*—In resolving a notable issue of first impression,²³⁰ the *Porter Hayden* court extended the use of the “need to inspect” standard to allow discovery of relevant portions of settlement agreements deemed confidential by the parties.²³¹ This decision was proper in light of the existing body of case law in other jurisdictions which allowed the discovery of relevant por-

227. *Id.* at 473, 713 A.2d at 972 (quoting *Montgomery County v. Volk Mfg. Co.*, 317 Md. 185, 191, 562 A.2d 1246, 1249 (1989) (quoting *Stem v. Nello L. Teer Co.*, 213 Md. 132, 133, 130 A.2d 769, 775 (1957))).

228. *Id.*

229. *Id.* at 473-74, 713 A.2d at 972.

230. *See id.* at 467, 713 A.2d at 969 (“[T]his Court has not examined the specific issue of whether a party may examine confidential settlement accords.”).

231. *See id.* at 468-69, 713 A.2d at 970 (concluding that “[p]etitioners had a ‘need to inspect’ so much of the settlement agreement as was relevant”). The broad scope of discovery under Maryland law, the relevance of the settlement agreements, and the fact that they were nonprivileged supported the court’s decision. *Id.* at 459-69, 713 A.2d at 965-70; *see also supra* notes 79-80 and accompanying text (explaining the scope of discovery under the Maryland Rules). Moreover, the court was persuaded by the wealth of federal and state court decisions outside of Maryland that permit the discovery of confidential settlement agreements. *Porter Hayden*, 350 Md. at 461-66, 713 A.2d at 966-69; *see also supra* note 81 and

tions of settlement agreements deemed confidential by the parties under certain circumstances.

The lower court decision initially identified this issue as whether or not “appellees’ submissions were [] *ex parte*.”²³² Its entire analysis of the issue relied upon the definition of *ex parte* and whether the submissions fit the definition of *ex parte*.²³³ The Court of Appeals properly characterized the issue as one that required application of the discovery rules.²³⁴ The court first looked to state and federal courts that had already identified this as a discovery issue for guidance.²³⁵ It then examined existing Maryland case law which permitted discovery of other documents deemed confidential by statute.²³⁶ The *Porter Hayden* court then applied the “need to inspect” standard established in those cases.²³⁷ A unanimous court approved the straightforward application of the “need to inspect” standard to ultimately allow discovery of relevant portions of settlement agreements deemed confidential by the parties.²³⁸

b. A “Need to Inspect.”—To allow the use of the need to inspect standard, the court applied guidelines created in *Zaal* and *Stein*, which pertain to a party’s ability to inspect statutorily confidential information.²³⁹ Because confidentiality in *Porter Hayden* was not created by statute, as in *Zaal* and *Stein*, but through an agreement between the two parties, the court properly reasoned that a lower standard exists for party-created confidentiality.²⁴⁰ The facts of the instant case satisfied the “need-to-inspect” standard²⁴¹ and the *Porter Hayden* court discontinued further analysis on this point. Thus, while the court will

accompanying text (examining the approach taken by other state and federal courts toward the discovery of confidential settlement agreements).

232. *Anchor Packing Co. v. Grimshaw*, 115 Md. App. 134, 168, 692 A.2d 5, 22 (1997), *vacated sub nom. Porter Hayden Co. v. Bullinger*, 350 Md. 452, 713 A.2d 962 (1998).

233. *Id.*

234. *Porter Hayden*, 350 Md. at 460, 713 A.2d at 965-66 (stating that “we have noted that the purpose of the discovery rules is to require the disclosure of facts by a party litigant to all of his adversaries”).

235. *Id.* at 462-66, 713 A.2d at 966-69.

236. *Id.* at 466-69, 713 A.2d at 969-70.

237. *Id.* at 468, 713 A.2d at 970.

238. *Id.* at 469, 713 A.2d at 970 (stating that the “sums and certain of the conditions of the settlements, however, are relevant and discoverable in the context of this proceeding”).

239. *Id.* at 467, 713 A.2d at 969 (stating that in *Zaal*, “we set forth the appropriate standards and procedures to be utilized when a . . . defendant attempts to obtain discovery of confidential information”).

240. *See id.* (suggesting that “there may be significantly less of a standard, where there is no statutory basis for the claims of confidentiality”).

241. *See supra* notes 207-213 and accompanying text (explaining the court’s analysis and application of the “need to inspect” standard).

allow the inspection of relevant portions of settlement agreements deemed confidential by the parties if the heightened "need to inspect" requirements have been met, the court has failed to establish what standard will suffice to compel discovery in these circumstances. The court should have adopted a standard which will provide future guidance, namely a relevance standard.

There is a substantial amount of case law which uses a relevance standard to allow discovery of settlement agreements. In *Young v. State Farm*,²⁴² the district court for the Southern District of West Virginia stated that certain portions of a confidential settlement agreement were discoverable "because Plaintiffs have demonstrated their relevance and probable admissibility."²⁴³ Similarly, in *Collier Services Corp. v. Salinas*,²⁴⁴ the Texas Supreme Court stated that "the terms of a settlement agreement are properly discoverable . . . to the extent that they are relevant."²⁴⁵ In *In re New York County Data Entry Worker Product Liability Litigation*,²⁴⁶ the New York Court of Appeals noted that relevancy dictates when discovery will be granted, but it went to great lengths to highlight that the court must weigh the goals of encouraging the settlement of disputes against those not entitled to examine the settlement agreement.²⁴⁷ It stressed that confidentiality in certain circumstances is necessary in order to protect the litigants or encourage fair resolution of the matter in controversy.²⁴⁸

In its decision, the Court of Appeals cited to the aforementioned cases, conceding that relevant portions of settlement agreements are discoverable²⁴⁹ while discussing the importance of maintaining the confidentiality of settlement negotiations and the overriding policy of encouraging parties to settle.²⁵⁰ But, instead of utilizing the relevance standard set out and relied upon in other jurisdictions, it looked to

242. 169 F.R.D. 72 (S.D.W. Va. 1996).

243. *Id.* at 79 (stating that "the confidential settlement agreement [is] discoverable because Plaintiffs have demonstrated their relevance and probable admissibility").

244. 812 S.W.2d 372 (Tex. 1991).

245. *Id.* at 377 (stating that "the terms of a settlement agreement are properly discoverable under Tex. R. Civ. P. 166b(2)(f)(2)").

246. 616 N.Y.S.2d 424 (Sup. Ct. 1994).

247. *Id.* at 428 (concluding that when balance favors confidentiality, confidentiality should be provided).

248. *Id.* (finding that "the strong public policy favoring settlement of disputed claims dictates that confidentiality agreements regarding such settlements not be lightly abrogated").

249. *Porter Hayden*, 350 Md. at 466, 713 A.2d at 969 (stating that "relevant portions of such settlement agreements are discoverable" and recognizing "the importance of maintaining the confidentiality of settlement negotiations").

250. *Id.* (stating that the court "recognize[s] the importance of maintaining the confidentiality of settlement negotiations").

other situations in Maryland where discovery of confidential information was used and applied a "need to inspect standard."

While it was proper to allow discovery under this heightened standard, the court should have used a pure relevance standard. A relevance standard balanced against the privacy interests of the plaintiffs could accomplish the same result desired through application of the "need to inspect" standards set out in *Zaal* and *Stein*.

In order to cross the *Zaal* "need to inspect" threshold, there must be a strong showing of relevance to overcome the privacy interests of the plaintiff.²⁵¹ In *Zaal*, the court stated "some relationship must be shown between the charges, the information sought, and the likelihood that relevant information will be obtained as a result of reviewing the records. [And] [w]hether a sufficient relationship exists is . . . dependent upon the circumstances, including the proffer of relevance."²⁵² Thus, the "need to inspect" standard requires not only a heightened showing of relevance, but consideration of other factors. The courts in *Zaal* and *Stein* created and utilized the "need to inspect standard" in light of the privacy and confidentiality of the parties at stake. In *Zaal*, the records of a child were protected by COMAR.²⁵³ In *Stein*, the records of the Department of Social Services were protected in order to encourage openness and honest communication.²⁵⁴ The courts were in essence providing another layer of protection for interests the state had already deemed necessary to protect by statute. In *Porter Hayden*, the confidentiality of the agreement in the instant case was established to promote future settlements.²⁵⁵ Under these circumstances, the privacy interests were not as overriding as the privacy interests in *Zaal* and *Stein*. Accordingly, the *Porter Hayden* court implied that "significantly less of a standard" could be used.²⁵⁶ The relevance standard, a significantly lower standard, is a plausible standard

251. *Zaal v. State*, 326 Md. 54, 83, 602 A.2d 1247, 1262 (1992) ("[J]uxtaposed against petitioner's proffer [of relevance] is the victim's legitimate interest in the privacy of the contents of her educational records.").

252. *Id.* at 81-82, 602 A.2d at 1261.

253. *Id.* at 60, 602 A.2d at 1251.

254. *Baltimore City Dep't of Soc. Servs. v. Stein*, 328 Md. 1, 4-5, 612 A.2d 880, 881 (1992) (citing the portion of Maryland Code Article 88A which states "it shall be unlawful for any person or persons to divulge or make known in any manner any information concerning any applicant or recipient of social services").

255. *See Anchor Packing Co. v. Grimshaw*, 115 Md. App. 134, 168, 692 A.2d 5, 21 (1997) (stating that "both parties have an interest in non-disclosure of settlement amounts because such information may affect future settlement negotiations in other cases. Such a practice of confidentiality . . . is customary in Baltimore"), *vacated sub nom. Porter Hayden Co. v. Bullinger*, 350 Md. 452, 713 A.2d 962 (1998).

256. *Porter Hayden*, 350 Md. at 468, 713 A.2d at 468.

used by courts in other jurisdictions to permit disclosure of confidential agreements. The court should have utilized this standard to provide guidance to courts in the future.

c. *A Default Judgment is Equated with Tortfeasor Status Under the Maryland UCATA.*—The Court of Appeals, with only one dissenting opinion,²⁵⁷ properly established that an entry of default judgment constituted an adjudication as a joint tortfeasor for purposes of verdict reduction under section 3-1404 of the UCATA.²⁵⁸ The court arrived at this conclusion by equating a default judgment to an admission of liability and then equating liability to the status of a joint tortfeasor.²⁵⁹ This decision is proper because, unlike the lower court's decision, it is consistent with the standards set out in *Swigert*.²⁶⁰ Furthermore, by creating this new class of joint tortfeasors, the court has maintained the policy goals of both the Maryland UCATA and the Maryland Rules to prevent double recovery by plaintiffs.²⁶¹

The *Porter Hayden* court properly applied the guidelines in *Swigert*, which require a settling party holding a release to have its liability as a joint tortfeasor judicially determined.²⁶² The *Swigert* court noted that "it would create a somewhat incongruous procedural situation to have a [released] party [absent] from the case and leave the question of his negligence yet to be determined."²⁶³ The court stated that though the liability of the released party needed to be determined, the defendant must individually determine whether to participate *actively* in the trial.²⁶⁴ This implied that regardless of the released defendant's decision, the question of his negligence would still need to be determined.

257. Judge Rodowsky dissented from the majority on this issue. *Id.* at 474, 713 A.2d at 972 (Rodowsky, J., concurring and dissenting).

258. *Porter Hayden*, 350 Md. at 469-73, 713 A.2d at 970-72.

259. *See also supra* notes 221-229 and accompanying text (discussing the implications of a default judgment).

260. *See supra* notes 143-158 and accompanying text.

261. *See supra* note 227 and accompanying text (noting that the goal underlying the Maryland Rules and the Maryland UCATA was "to try in one action all phases of [the] litigation").

262. *Swigert v. Welk*, 213 Md. 613, 619, 133 A.2d 428, 431 (1957) (stating that "in order for [a non-settling party] to be certain that he will obtain these reductions, it is necessary that negligence on the part of the [released party] contributing to the injuries must be shown . . ."); *see also* MD. CODE ANN., CTS. & JUD. PROC. § 3-1304 (Supp. 1997) ("[A] release by the injured person of one joint tort-feasor . . . reduces the claim against the other tort-feasors.").

263. *Swigert*, 213 Md. at 622, 133 A.2d at 433.

264. *Id.* ("[W]hether [settling defendant] wishes to participate actively in the trial is a matter left for his selection.").

Consistent with *Swigert*, B&W's default judgment could be classified as "non-active" participation. B&W's status should be determined through default even though B&W chose not to take part in the proceedings. By not allowing the default judgment to constitute status as a joint tortfeasor, the question of B&W's liability remained open. This would fundamentally contradict the holding of *Swigert*, which required the question of the released party's liability to be answered.²⁶⁵ Porter Hayden should not be penalized for the actions of B&W.

The *Porter Hayden* decision is also proper because upholding the lower court's decision would have fundamentally contradicted the effect of a default judgment. Forbidding the default judgment to substitute for adjudication as a tortfeasor would mean that a default judgment does not determine liability. This is contrary to the extensive amount of case law that accepts and recognizes a default judgment as an admission of liability.²⁶⁶ The very definition of judgment is "the final decision of the court resolving the dispute and determining the rights and obligations of the parties."²⁶⁷ In *Porter Hayden*, B&W was impleaded in order to determine their liability.²⁶⁸ By not answering the complaint, B&W essentially admitted liability. The entry of default judgment officially determined the rights and obligations of B&W.²⁶⁹ Thus, though the plaintiffs and nonsettling defendants could not further recover damages from the settling defendants, the nonsettling defendants were entitled to a reduction in their verdict.²⁷⁰

Finally, the *Porter Hayden* court's decision to allow a default judgment to substitute for adjudication as a tortfeasor was proper because it upheld the policy goal of the UCATA: to prevent double recovery.²⁷¹ If a settling defendant is improperly prevented from being classified as a tortfeasor, then a plaintiff is entitled to the amount of damages rendered against the nonsettling tortfeasor, in addition to the amount of consideration paid by the settling defendant, i.e., a double recovery. Thus, in the instant case, if Porter Hayden failed to classify B&W as a joint tortfeasor, the nonsettling defendant would not

265. *Id.* at 619, 133 A.2d at 431 ("[N]egligence on the part of the [released defendant] contributing to the injuries must be shown in one manner or another.").

266. See *supra* notes 223-225 and accompanying text.

267. BLACK'S LAW DICTIONARY 842 (6th ed. 1990).

268. See *supra* notes 37-39 and accompanying text.

269. See *supra* notes 225-229 and accompanying text.

270. MD. CODE ANN., CTS. & JUD. PROC. § 3-1402(c) (Supp. 1997).

271. *Anchor Packing Co. v. Grimshaw*, 115 Md. App. 134, 167, 690 A.2d 5, 22 (1997) (quoting *Owens-Illinois, Inc. v. Armstrong*, 326 Md. 107, 126, 604 A.2d 47, 56 (1992)), *vacated sub nom. Porter Hayden Co. v. Bullinger*, 350 Md. 452, 713 A.2d 962 (1998).

have obtained a reduction in the verdict and the plaintiff would have recovered two times. This result would have been inconsistent with the policy goals of the UCATA.

5. *Conclusion.*—In *Porter Hayden*, the Court of Appeals properly arrived at two decisions. First, in an issue of first impression, it expanded the scope of discovery in Maryland by extending the use of the “need to inspect” standard to apply to the discovery of settlement agreements deemed confidential by the parties. Though the decision was consistent with pre-existing law, the court adopted a standard that determined the upper threshold of admissibility. It failed to establish a standard that would constitute a lower, but acceptable threshold. In so doing, the court has left this decision to future courts. Second, the court created a new classification of tortfeasor when it equated a default judgment with a finding of liability for purposes of establishing a party as a joint tortfeasor under the UCATA. In so doing, the court has prevented the opportunity for litigation misconduct and upheld the policy goal of preventing double recovery by plaintiffs.

APRIL M. MAYO

B. *Redefining the Practice of Strict Compliance in Literal Terms*

In *Butler v. Tilghman*,²⁷² the Court of Appeals held that a valid lien of attachment before judgment can only be created by strict adherence to the procedures set forth in Maryland Rule 3-115.²⁷³ Specifically, after carefully reviewing the procedural requirements of Rule 3-

272. 350 Md. 259, 711 A.2d 859 (1998).

273. *Id.* at 270, 711 A.2d at 864. Rule 3-115 states, in pertinent part:

(a) *Request for writ.* At the time of filing a complaint commencing an action or while the action is pending, a plaintiff entitled by statute to attachment before judgment may file a request for an order directing the issuance of a writ of attachment for levy or garnishment of property or credits of the defendant. The request may be made ex parte. The plaintiff shall file with the request an affidavit verifying the facts set forth in the complaint and stating the grounds for entitlement to the writ. . . .

(c) *Proceedings on request for writ.* The court shall review the complaint, any exhibits, and the supporting affidavit. The court may require the plaintiff to supplement or explain any of the matters set forth in the documents or to provide further information regarding the property to be attached. If the court determines that the plaintiff is entitled to the writ of attachment, it shall order issuance of the writ conditioned on the filing of a bond by the plaintiff for the satisfaction of all costs and damages that may be awarded the defendant or a claimant of the property by reason of the attachment. The order shall prescribe the amount and security of the bond.

115, the Court of Appeals reinforced the necessity of filing a sheriff's return²⁷⁴ prior to the filing of a Notice of Lien in order to establish a valid lien on the property.²⁷⁵ The court unanimously reached this holding after deferring to legislative intent and reviewing both Maryland and out-of-state case law.²⁷⁶ In doing so, the court properly refused to lessen the standard of strict compliance that creditors must maintain in order to obtain a valid lien of attachment. As a result of its decision, the court has eliminated the potential flood of lawsuits that would result between creditors and good faith purchasers of debtors' properties if the latter were no longer sheltered by Maryland's race-notice recording statute.²⁷⁷

(d) *Issuance of writ.* Upon entry of the order and the filing of the bond, the clerk shall issue one or more writs of attachment and shall attach to each writ a copy of the supporting affidavit filed with the request. . . .

(e) *Notice of lien of attachment.* When real property is attached, upon the filing of the return by the sheriff the clerk shall file a Notice of Lien marked "Attachment Before Judgment on Real Property." The notice shall contain (1) the name of each plaintiff, (2) the name and address of each defendant, (3) the assigned docket reference of the action, and (4) the name of the county in which the action was commenced.

. . . When the real property is located outside of Baltimore City, the Notice of Lien shall be filed with the clerk of the circuit court for the county in which the property is located and shall constitute a lien on the property when entered by the clerk of the circuit court.

If the attachment is dissolved, released, or otherwise modified, the clerk shall transmit a certified notice of that action to each clerk with whom a Notice of Lien was filed.

MD. RULE 3-115.

274. Delivering back to the court proof of service that the writ of execution was levied, along "with a brief account of his doings under the mandate, [and] the time and mode of . . . execution" constitutes a sheriff's "return." BLACK'S LAW DICTIONARY 1318 (6th ed. 1990).

275. *Butler*, 350 Md. at 270-72, 711 A.2d at 864-65.

276. *Id.*

277. *Id.* at 273, 711 A.2d at 866 (concluding that the petitioners, good faith purchasers of the debtor's property, took title to the property "free and clear of respondent's claim of a lien"). See MD. CODE ANN., REAL PROP. § 3-203 (1957):

Every recorded deed or other instrument takes effect from its effective date as against the grantee of any deed executed and delivered subsequent to the effective date, unless the grantee of the subsequent date has:

- (1) Accepted delivery of the deed or other instrument
 - (i) In good faith,
 - (ii) Without constructive notice under § 3-202, and,
 - (iii) For a good and valuable consideration, and,
- (2) Recorded the deed first.

See also *infra* text accompanying note 393 (discussing the implications of the fact that in Maryland, the timing of the recordation by a good faith purchaser determines who holds title in a property).

1. *The Case.*—The confusion in the *Butler* case arose out of a series of ill-timed events. On August 7, 1992, Johnnie R. Tilghman filed suit in Charles County district court against Sandra and Wayne Payne, alleging that the Paynes had “obtained [his] property with worthless checks.”²⁷⁸ The Paynes had written Tilghman two checks, totaling \$18,100, as payment for the purchase of two automobiles.²⁷⁹ The Paynes’ bank returned the checks due to insufficient funds.²⁸⁰ Tilghman sought judgment for the amount of the returned checks and related bank fees.²⁸¹

In addition to filing suit on August 7, 1992, Tilghman also filed a “Request for an Order for the Issuance of a Writ of Attachment Before Judgment” with the district court.²⁸² As authorized by Section 3-302 of the Courts and Judicial Proceedings Article, Tilghman wanted to levy on real property owned by the Paynes as a means of securing payment on the debt should a judgment be entered against them. On August 26, 1992, the district court issued a Writ of Attachment Before Judgment.²⁸³

On September 25, the district court prematurely sent to the Circuit Court for Charles County a “Notice of Lien of Attachment Before Judgment.”²⁸⁴ The district court’s action was premature for two reasons. First, the sheriff had not yet filed his return and proof of service with the district court as required by the statute.²⁸⁵ Presumably to reflect the absence of the sheriff’s return, the district court clerk modified the language of the Notice so that it stated an attachment had

278. Plaintiff’s Request for an Order for the Issuance of a Writ of Attachment Before Judgment (3-115), *Tilghman v. Payne*, No. 42-2784-92 (Md. Dist. Ct. Aug. 7, 1992); see *Butler*, 350 Md. at 260, 711 A.2d at 859.

279. *Butler*, 350 Md. at 260, 711 A.2d at 859. At this time, Tilghman was doing business as Cars Plus. *Id.* The Paynes wrote Tilghman two checks, one for \$6300, and the other for \$11,800. *Id.*

280. *Id.*

281. *Id.*

282. *Id.*

283. *Id.* at 260-61, 711 A.2d at 859.

284. *Id.* at 261, 711 A.2d at 859-60.

285. *Id.* at 261, 270, 711 A.2d at 859-60, 864; see MD. RULE 3-115(e) (requiring the sheriff to file a return before the court files its Notice of Lien of Attachment Before Judgment).

been “issued” as opposed to “levied.”²⁸⁶ Second, Tilghman did not request that the Notice of Lien be sent to the circuit court.²⁸⁷

On September 28, 1992, the sheriff levied on the property.²⁸⁸ On that same day, the circuit court clerk stamped the Notice of Lien of Attachment Before Judgment as received.²⁸⁹ Although the circuit court filed the Notice of Lien, it did not index it, which is to say it failed to list the lien in the judgment index for Charles County.²⁹⁰ The sheriff did not file a return with the district court until October 1, 1992.²⁹¹ The return certified that on September 28, 1992, the sheriff had attached the property by affixing a copy of the writ and schedule to the property, and mailing a copy of the writ, complaint, and attachment before judgment to the Paynes’ last known address.²⁹² Because the sheriff did not complete the levy prior to the district court forwarding the Notice of Lien to the circuit court, the circuit court filed a Notice of a Lien before an actual lien existed on the Paynes’ property.²⁹³

On October 29, 1992, George and Mary Butler entered into a contract of sale with the Paynes for the purchase of the levied property.²⁹⁴ Because the lien was not indexed, the Butlers’ search of the circuit court’s judgment index did not reveal Tilghman’s judgment lien against the property.²⁹⁵ The Paynes executed a deed transferring the property to the Butlers on December 18, 1992.²⁹⁶ This deed was recorded in the land records of the Circuit Court for Charles County on December 23, 1992.²⁹⁷

286. *Butler*, 350 Md. at 261 n.1, 711 A.2d at 860 n.1. The district court clerk actually “crossed out the word ‘levied,’” which was printed on the Notice of Lien of Attachment Before Judgment form and “replaced it with the word ‘issued.’” *Id.* Interestingly, the district court clerk ordered the sheriff to serve the attachment on September 25, 1992, Order for Service, *Tilghman v. Payne*, No. 42-2784-92 (Md. Dist. Ct. Sept. 25, 1992), the same day that he sent the circuit court the Notice of Lien of Attachment. Notice of Lien of Attachment Before Judgment, *Tilghman v. Payne*, No. 42-2784-92 (Md. Dist. Ct. Sept. 25, 1992). The same clerk’s signature appeared on both the Notice of Lien of Attachment Before Judgment sent to the circuit court and the Order for Service sent to the sheriff. *Id.*; see Order for Service, *Tilghman* (No. 42-2784-92).

287. Intervening Defendants’ Memorandum in Opposition to Decision of the District Court at R. 60, *Tilghman v. Payne*, No. 42-2784-92 (Md. Dist. Ct. Aug. 7, 1992).

288. *Butler*, 350 Md. at 262, 711 A.2d at 860.

289. *Id.*

290. *Id.*

291. *Id.*

292. *Id.* at 261, 711 A.2d at 860.

293. *Id.*

294. *Id.*

295. *Id.*

296. *Id.*

297. *Id.*

On January 6, 1993, a default judgment was entered in district court against the Paynes in favor of Tilghman.²⁹⁸ It was not until January 21, 1993, however, that the circuit court finally indexed the lien in the circuit court records.²⁹⁹ Thus, the lien was indexed almost one full month after the Butlers recorded their deed.³⁰⁰

Approximately three years later, Tilghman's attorney notified the Butlers of his client's intent to enforce the lien.³⁰¹ On September 20, 1996, Tilghman requested the court to enforce the writ of execution.³⁰² In response, the Butlers moved to intervene and filed their opposition to Tilghman's request.³⁰³ The district court granted Tilghman's motion and permitted the sale of the property to satisfy the judgment.³⁰⁴ In reaching its decision, the district court found that "while as a practical matter, [failing to index] makes it impossible for a title searcher to obtain [judgment] information . . . the purchaser is still charged with that knowledge."³⁰⁵ The district court reasoned that the clerk's filing but not indexing the lien should have been enough to put the Butlers on notice.³⁰⁶ The Butlers appealed to the Circuit Court for Charles County, which affirmed the district court's ruling.³⁰⁷ The circuit court concluded that indexing is not essential to the act of recordation; therefore the "attachment [before] judgment had been effective prior to the entry of the Butler's deed."³⁰⁸ The Court of Appeals granted certiorari to decide "whether a valid lien was created when the Notice of Lien of Attachment was filed prior to the filing of the return of levy by the sheriff."³⁰⁹

298. *Id.*

299. *Id.* at 261-62, 711 A.2d at 860.

300. *Id.* at 262, 711 A.2d at 860.

301. The letter is dated April 11, 1996. Record at 15.

302. *Butler*, 350 Md. at 262, 711 A.2d at 860.

303. Record at 5-6, 18-20.

304. *Butler*, 350 Md. at 262, 711 A.2d at 860.

305. Petition for a Writ of Certiorari at 6, *Butler v. Tilghman*, 350 Md. 259, 711 A.2d 859 (1998) (No. 125) (internal quotation marks omitted) (quoting the oral opinion of the district court judge).

306. Petition at 37, *Butler* (No. 125). The district court disregarded the inescapable quagmire in which such a holding would place good faith purchasers.

307. *Butler*, 350 Md. at 262-64, 711 A.2d at 861.

308. *Id.* at 263, 711 A.2d at 861 (alteration in original) (quoting the oral opinion of the circuit court judge (citing *Frank v. Storer*, 308 Md. 194, 517 A.2d 1098 (1986))).

309. *Id.* at 260, 711 A.2d at 859. The second issue presented by the Petitioners was "whether a lien entered pursuant to a writ of attachment on original process must be recorded and indexed in order for the lienholder to have priority over a subsequent good faith purchaser." *Id.* The Court of Appeals did not reach this issue because it held that no valid lien was created when the Notice of Lien was filed prior to the filing of the return by the sheriff. *Id.*

2. *Legal Background.*—

a. *Maryland's Interpretation of Compliance Standards.*—

(1) *Maryland Rule 3-115.*—Rule 3-115 establishes the procedure that must be followed to create a valid lien in a proceeding to attach property before judgment.³¹⁰ The rule first requires a creditor to request an order directing the issuance of a writ of attachment before judgment by filing this request with a supporting affidavit.³¹¹ Upon receiving and reviewing the creditor's request, the district court, if appropriate, issues a writ on the condition that the plaintiff files a bond.³¹² Upon filing the bond, the district court issues a writ of attachment directing the sheriff to levy on the property.³¹³ Issuance of the writ, however, does not establish a lien on the property.³¹⁴ "When real property is attached, upon the filing of the return by the sheriff the clerk shall file a Notice of Lien marked 'Attachment Before Judgment on Real Property.'"³¹⁵ Moreover, "the Notice of Lien shall be filed with the clerk of the circuit court for the county in which the property is located and shall constitute a lien on the property when entered by the clerk of the circuit court."³¹⁶

In other words, the levy is complete when the sheriff files the return of service with the clerk of the district court, who in turn must forward the notice of attachment to the clerk of the circuit court for the county in which the property is located for proper indexing and recording.³¹⁷

The attachment procedure is "designed to accomplish the dual purpose of compelling the defendant's appearance in court as well as providing the plaintiff with security for the payment of his claim once it is established as being due."³¹⁸ The use of this procedure invokes the doctrine of relation back.³¹⁹ Under this doctrine, "once [an at-

310. MD. RULE 3-115.

311. *Id.* 3-115(a).

312. *Id.* 3-115(c).

313. *Id.* 3-115(d); *Butler*, 350 Md. at 266-67, 711 A.2d at 862-63.

314. *Butler*, 350 Md. at 266, 711 A.2d at 862 (citing *May v. Buckhannon River Lumber Co.*, 70 Md. 448, 449-50, 17 A. 274, 275 (1889) (quoting *Horwitz v. Ellinger*, 31 Md. 492, 505 (1869))); *see infra* Part 2.a(3) (stressing that a valid lien is not created until the sheriff attaches the property and returns the order of service to the court).

315. MD. RULE 3-115(e).

316. *Id.*

317. *Id.*; *Butler*, 350 Md. at 267, 711 A.2d at 863.

318. *Butler*, 350 Md. at 267, 711 A.2d at 863 (internal quotation marks omitted) (quoting *State v. Friedman*, 283 Md. 701, 706-07, 393 A.2d 1356, 1359-60 (1978) (citing *Philbin v. Thurn*, 103 Md. 342, 351, 63 A. 571, 574 (1906))).

319. *Id.* (quoting *Friedman*, 283 Md. at 706-07, 393 A.2d at 1359-60).

achment] is properly and validly acquired, it is retained to await the result of the action,"³²⁰ and "claims or liens arising subsequent to the date of the [attachment] are subordinate to the judgment rendered in the attachment case."³²¹

(2) *Standards of Compliance: When "Strict" Really Means "Substantial," not "Literal."*—Proceedings in attachment are a statutory creation and did not exist at common law.³²² Consequently, Maryland courts have long stressed that persons involved must strictly adhere to statutory procedures such as the attachment process.³²³ The courts, however, initially created some confusion by placing a liberal construction on whether literal compliance or substantial compliance was necessary to satisfy the strict compliance rule.

For example, in the 1870 case of *Evesson v. Selby*,³²⁴ the Court of Appeals considered the language of an attachment statute requiring that affidavits made out of state be accompanied by a certificate of the clerk of the foreign court verifying that the court was "a court of record."³²⁵ The court reasoned that although the statute calls for strict compliance, literal compliance is not necessary; rather, "substantial compliance is all that is necessary."³²⁶ The court found, however, that the creditor's affidavit for attachment did not even meet the burden

320. *Id.* at 267-68, 711 A.2d at 863 (alteration in original) (internal quotation marks omitted) (quoting *Friedman*, 283 Md. at 706-07, 393 A.2d at 1359-60).

321. *Id.* at 268, 711 A.2d at 863 (quoting *Friedman*, 283 Md. at 706-07, 393 A.2d at 1359-60).

322. *Id.* (quoting *Gill v. Physicians' & Surgeons' Bldg., Inc.*, 153 Md. 394, 403-05, 138 A. 674, 677-78 (1927) and citing *Turner v. Lytle*, 59 Md. 199, 208 (1882); *Evesson v. Selby*, 32 Md. 340, 345 (1870)).

323. See *Turner*, 59 Md. at 208, ("It cannot be questioned that the law is derogatory of the common law, and must be strictly construed . . ."); *Evesson*, 32 Md. at 345 ("[T]he proceedings in attachment being wholly statutory, and in contravention to the common law, they must strictly follow the provisions of the statute under which they are authorized.").

324. 32 Md. 340 (1870).

325. *Id.* at 344.

326. *Id.* at 346. The court based this decision on earlier Maryland cases, most of which accepted substantial compliance of strict compliance statutes as sufficient; in other words, they did not require literal compliance with those standards. *Id.*; see *Washington v. Hodgskin*, 12 G. & J. 353 (1842) (holding that the certification of an affidavit by the Governor of Mississippi sufficiently complied with the strict compliance requirements of the Act of 1795); *Smith v. Greenleaf*, 4 H. & McH. 189 (1799) (holding that although the Act of 1795 regulating attachment law required "stringent" compliance as to the judicial certification of an affidavit of another state, certification by the Governor of Massachusetts would suffice). But see *Prentiss v. Gray*, 4 H. & J. 193 (1816) (holding that because the court did not have the authority to accept anything less than literal compliance with the Act, the clerk's unauthorized administration of an oath by which a certificate was provided would not suffice).

of substantial compliance because it failed to produce any certification proving the court was one "of record."³²⁷

After the turn of the century, the Court of Appeals remained steadfast in finding that strict compliance did not mean literal compliance, but rather substantial compliance with strict statutory requirements. In *Tonns v. Collins*,³²⁸ the court acknowledged that the attachment statute required strict compliance, but it chose not to quash the creditor's attachment even though the clerk sent the summons to the wrong county.³²⁹ The court instead noted that "[i]t has been held that a substantial compliance with the terms of the statute is sufficient to give the court jurisdiction."³³⁰ The court added that "it would seem unduly technical to quash the attachment simply on the ground that the summons was not sent [by the clerk] to a different county."³³¹

As noted in the 1918 case of *Hedrick v. Markham*,³³² the Court of Appeals continued to accept "substantial compliance" with strict compliance statutes. In *Hedrick*, a creditor attached the bank account of a nonresident debtor.³³³ The court considered whether to quash the attachment, and thereby accept the debtor's argument that the creditor had not satisfied the literal requirements of the controlling statute which included producing bond or account evidence of the debt.³³⁴ The court refused to do so, stating that a creditor need only exert "substantial compliance with the provisions and the requirements of the statute under which it is authorized."³³⁵ The court reasoned that the filing of a specific cause of action was sufficient to satisfy the statute.³³⁶

In *Gill v. Physicians' & Surgeons' Building, Inc.*,³³⁷ the Court of Appeals reviewed an attachment issued to secure payment from a nonresident debtor for legal services rendered by the plaintiff in accordance

327. *Evesson*, 32 Md. at 346.

328. 116 Md. 52, 81 A. 219 (1911).

329. *Id.* at 53, 81 A. at 220-21.

330. *Id.*, 81 A. at 220 (citing *Gunby v. Porter*, 80 Md. 402, 31 A. 324 (1895); *Evesson*, 32 Md. 346).

331. *Id.*

332. 132 Md. 160, 103 A. 98 (1918).

333. *Id.* at 161, 103 A. at 98.

334. *Id.* at 162, 103 A. at 98. "[S]ection 4 of article 9 of the Code . . . provided: 'No attachment shall issue . . . unless . . . the creditor shall produce the bond, account or other evidence of debt . . .'" *Id.*

335. *Id.* (citing 2 Poe's Pl. & Pr. 502; *Franklin v. Claflin*, 49 Md. 24 (1878); *Evesson*, 32 Md. 340; *Mears v. Adreon*, 31 Md. 229 (1869); *Tonns*, 116 Md. 52, 81 A. 219).

336. *Id.*

337. 153 Md. 394, 138 A. 674 (1927).

with promises set forth in a contract between the parties.³³⁸ The defendant argued that the court should not reverse the quashing of the attachment because the plaintiff failed to satisfy the requirements of the controlling statute, which included filing a sufficient affidavit, bond, and declaration.³³⁹ Like courts before it, however, the *Gill* court concluded that "the requirements of the statute [need only be] substantially complied with" by the plaintiff in order for the attachment to be valid.³⁴⁰ Because the plaintiff either complied with the statute initially or tried to comply with it in an amended complaint which the lower court refused to admit,³⁴¹ the court reversed the quashing of the amendment.³⁴² It is interesting to note, however, that the *Gill* court thought the amended bond would have cured any defects because it reportedly would have "strictly and literally [complied] with the terms of the statute."³⁴³

(3) *The Critical Role of the Sheriff in Fulfilling Any Compliance Standard.*—As a matter of conveying jurisdiction, Maryland courts have recognized the critical role the sheriff plays in both establishing the court's jurisdiction³⁴⁴ and the validity and priority of the lien.³⁴⁵ The Court of Appeals has repeatedly reinforced the notion that it is the sheriff who creates the inchoate lien by attaching the property and filing his return with the court.³⁴⁶ Maryland courts are not alone in stressing the importance of this step in the attachment process. It is

338. *Id.* at 395-96, 138 A. at 675.

339. *Id.* at 398, 138 A. at 676. "[S]ection 44, article 9, Bagby's Code . . . provides that: Attachments may also be issued against non-resident . . . debtors in cases arising ex contractu . . . [but only if] a declaration . . . [an] affidavit of the plaintiff . . . and a bond [have been] filed" *Id.*, 138 A. at 675.

340. *Id.* at 405, 138 A. at 678 (internal quotation marks omitted) (quoting *Coward v. Dillinger*, 56 Md. 59, 60 (1881)).

341. *Id.* at 402, 138 A. at 677. The lower court did not allow the plaintiff to amend the bond in question despite the language of "[s]ection 28, art. 9, Bagby's Code [which stated that] all other papers in attachment proceedings may be amended." *Id.* at 400, 138 A. at 676.

342. *Id.* at 407, 138 A. at 679.

343. *Id.* at 402, 138 A. at 677.

344. See Petition at 11, *Butler* (No. 125) ("[T]he return of the sheriff levying the attachment is an [sic] necessary part of the attachment proceeding. Only through the return is the court advised of the levy and its sufficiency, [by which] jurisdiction is acquired" (citation omitted)).

345. See *infra* notes 340-360.

346. See *May v. Buckhannon River Lumber Co.*, 79 Md. 448, 448, 17 A. 274, 275 (1889) (determining that "merely issuing a writ of attachment, and placing it in the hands of a sheriff" does not create a lien); *Main v. Lynch*, 54 Md. 658, 668-69 (1880) (finding that the return of the sheriff is "a necessary part of the [attachment] proceeding," but to allow him to amend it after all other evidence had been submitted would have been improper and unfair to the parties involved).

generally recognized that “[t]he return is a necessary part of the proceeding . . . without which the court cannot proceed to final adjudication of the cause.”³⁴⁷ Thus, the sheriff must properly comply with an order and file the return before a creditor is able to obtain security against a debt.³⁴⁸

One of the first cases in which the Court of Appeals recognized the critical role played by the sheriff in the process of creating a lien was *Main v. Lynch*.³⁴⁹ After making his case, the creditor in *Main* asked that the sheriff, who forgot to attach a copy of the short note when serving the writ and thus failed to properly attach the property, be allowed to amend his return.³⁵⁰ The court declined, determining that it would be unreasonable to permit a sheriff to amend a return of writ after all other evidence had been submitted and when such an amendment would affect the rights of third parties.³⁵¹ The court noted that “[t]he return of the sheriff is . . . a necessary part of the proceeding, without which the attachment would, upon motion, be quashed.”³⁵² Because of the interest in the attachment held by the third party, the delinquent timing of the motion to amend was the creditor’s Achilles’ heel.³⁵³

In *May v. Buckhannon River Lumber Co.*,³⁵⁴ the sheriff was given two writs, Buckhannon’s being the first, to levy against the debtor’s property.³⁵⁵ The sheriff, however, executed the writs in the reverse order and served Buckhannon’s writ second.³⁵⁶ Buckhannon argued that it held the priority lien as against the debtor because its writ of attachment was issued, albeit not levied, before the other creditor’s lien.³⁵⁷ The court determined, however, that “merely issuing a writ of attachment, and placing it in the hands of a sheriff” does not create a

347. 7 C.J.S. *Attachment & Garnishment* § 194 (1980) (citing *Bolling v. Pikesville Nat’l Bank*, 280 S.W. 1090, 1092 (Ky. 1926)); see also 6 AM. JUR. 2D *Attachment & Garnishment* § 316 (1964) (“The return of a writ of attachment, being required by statute, is necessary to create a lien on the property attached, and the failure of the levying officer to file a return may be fatally defective” (citing *Bass v. Dumas*, 95 A. 286 (Me. 1915); *Mitchell v. Pierce*, 86 A. 748 (Vt. 1913); *Albright-Pryor Co. v. Pacific Selling Co.*, 55 S.E. 251 (Ga. 1906); *Peterson v. Wiesner*, 146 P.2d 789 (Nev. 1944); *Dickinson v. First Nat’l Bank*, 252 N.W. 54 (N.D. 1933))).

348. 6 AM. JUR. 2D *Attachment & Garnishment* § 316.

349. 54 Md. 658 (1880).

350. *Id.* at 668.

351. *Id.* at 668-69.

352. *Id.* at 670.

353. *Id.* at 669-70.

354. 79 Md. 448, 17 A. 274 (1889).

355. *Id.* at 448, 17 A. at 274.

356. *Id.*, 17 A. at 275.

357. *Id.*, 17 A. at 274-75.

lien.³⁵⁸ Because the property attached by Buckhannon and the other creditor was not the same, the court also found that "the only lien created by levying an attachment is on the [specific] property actually taken by the sheriff."³⁵⁹ Because of this, a judgment cannot be entered unless the adjudicating court has jurisdiction, which is achieved through proper adherence to legislative requirements.³⁶⁰

b. Other Jurisdictions Interpretation of Strict Compliance.—Unlike Maryland, other jurisdictions require the practice of *literal* strict compliance to statutory procedure. In *Bass v. Dumas*,³⁶¹ for example, the Supreme Judicial Court of Maine determined that in accordance with the statutory procedure for creating a lien of attachment, an officer must either "retain possession [of the attached property] or within five days file such an attested copy of his [signed] return as the statute prescribes."³⁶² In *Bass*, the lien of attachment was invalid because the sheriff did not sign the return of service himself before filing it with the court.³⁶³ Because the sheriff allowed someone else to sign the return, thereby violating the mandate of the governing statute, the creditor in *Bass* lost his lien to secure payment of the property delivered to the debtor.³⁶⁴ While the sheriff's conduct may have substantially complied with the statute, it did not literally comply with it.³⁶⁵ Thus, the Maine court concluded that only literal and strict adherence to the requirements set forth in the statute could create a valid lien.³⁶⁶

The Superior Court of Connecticut in *Jepsen v. Toni Co.*³⁶⁷ came to a similar conclusion when it noted that the time limits involved in creating a writ of attachment were specifically drafted by the Connecticut legislature³⁶⁸ and must be strictly and literally met.³⁶⁹ In *Jepsen*, the sheriff abided by an attachment order's instructions requiring him

358. *Id.*, 17 A. at 275 ("[N]o man can, by merely applying for and obtaining a writ of attachment, create a lien on . . . the property of another person.").

359. *Id.*

360. See *Gill v. Physicians' & Surgeons' Bldg., Inc.*, 153 Md. 394, 405, 138 A. 674, 678 (1927) (providing that "the principle has become firmly established in this state . . . [that] attachment statutes will be strictly construed in determining what steps must be taken to confer jurisdiction on the court issuing the attachment").

361. 95 A. 286 (Me. 1915).

362. *Id.* at 288.

363. *Id.* at 287.

364. *Id.* at 288.

365. *Id.*

366. *Id.*

367. 133 A.2d 150 (Conn. Super. Ct. 1957).

368. *Id.* at 154. The *Jepsen* court referred to section 7767 of the General Statutes, which "expressly provides that process in civil actions returnable to the Superior Court 'shall be

to file his return “on or before the first Tuesday of February A.D. 1957.”³⁷⁰ The defendant argued that these instructions violated the regulating statute, which required at least six days to pass before the sheriff was permitted to file his return with the court.³⁷¹

Although the sheriff was merely obeying the attachment order, the court found his actions violated a “mandatory” statute that must be adhered to literally in order to avoid being “fatally defective.”³⁷²

3. *The Court's Reasoning.*—In *Butler v. Tilghman*, the Court of Appeals held that a valid lien was not created when Tilghman's notice of lien was filed with the courts and that, because the lien in question was not corrected nor a new lien filed, Tilghman's lien did not become valid until after the Butlers had purchased and recorded their interest in the property.³⁷³ The court reached this holding by examining the procedural steps required by Rule 3-115 to obtain a valid lien and by recognizing that “strict compliance with the steps of the statute is required.”³⁷⁴ Quoting each critical step in the attachment procedure, the court painstakingly reviewed the rule's requirements regarding how a creditor requests a writ, how the court proceeds with the creditor's request, and how the writ is issued.³⁷⁵ The court particularly relied on the explicit language of the rule requiring that the notice of lien should be filed by the clerk of court only “upon the filing of the return by the sheriff.”³⁷⁶ Because the property in dispute was not levied prior to the filing of the notice and because the eventual filing of the return by the sheriff did not retroactively cure the defective lien, the court held that Tilghman's lien did not exist.³⁷⁷

The court then explained that one purpose of the attachment process is to “provid[e] the plaintiff with security for the payment of his claim once it is established as being due.”³⁷⁸ The court noted that the levy of property by a sheriff “creates an inchoate lien” that binds

returned . . . to the clerk of such court at least six days before the return day.” *Id.* (omission in original).

369. *Id.*

370. *Id.* at 153 (quoting the order for further attachment).

371. *Id.* at 154. See *supra* note 368 for the exact statutory language.

372. *Jepsen*, 133 A.2d at 154.

373. *Butler*, 350 Md. at 272, 711 A.2d at 865.

374. *Id.* at 265-68, 711 A.2d at 862-63; see also *supra* note 273 (quoting the relevant provisions of Rule 3-115).

375. *Butler*, 350 Md. at 265-66, 711 A.2d at 862.

376. *Id.* at 266, 711 A.2d at 862.

377. *Id.* at 272, 711 A.2d at 865.

378. *Id.* at 267, 711 A.2d at 863 (internal quotation marks omitted) (quoting *State v. Friedman*, 283 Md. 701, 706-07, 393 A.2d 1356, 1359-60 (1978)).

the property attached until judgment is entered³⁷⁹ and that any "claims or liens arising subsequent to the date of the levy are subordinate to the judgment rendered in the attachment case" under the doctrine of relation back.³⁸⁰ The court concluded, however, that Tilghman did not acquire the inchoate lien that normally attaches when the sheriff levies against property; therefore the judgment lien obtained by Tilghman in the attachment case did not relate back to the time of the levy and was subordinate to the Butlers' claim of title.³⁸¹

Upon analyzing both the purpose and the steps of the attachment process, the court turned its attention to the public policy and legislative intent implicated in its holding. The court recognized that if Tilghman's lien was considered valid despite its flawed creation, the court "would encourage plaintiffs seeking to utilize the attachment before judgment procedures to disregard the clear language of Maryland Rule 3-115."³⁸² The court reasoned that if the legislature had wanted a lien to be created "upon the mere issuance of a writ of attachment, the inclusion of the provisions dealing with the levy and the filing of the sheriff's return would have been unnecessary."³⁸³ Moreover, the court indicated that had Tilghman amended his lien or even filed a new one after the levy was returned by the sheriff, he might have been able to cure the original lien's defect.³⁸⁴ However, because the Butlers' deed was recorded prior to the entry of the default judgment against the Paynes, the Butlers took the property free and clear of Tilghman's claim of lien.³⁸⁵

4. *Analysis.*—In *Butler v. Tilghman*, the Court of Appeals determined that under Maryland Rule 3-115, a valid lien is not created when a Notice of Lien of Attachment is filed prior to the filing of the return of levy by the sheriff.³⁸⁶ By requiring creditors to adhere exactly to the specific chronology mandated by the General Assembly for the creation of a valid lien, the court seemed to shift away from its prior "substantial compliance" approach to the strict compliance stan-

379. *Id.* (internal quotation marks omitted) (quoting *Friedman*, 283 Md. at 706-07, 393 A.2d at 1359-60).

380. *Id.* (internal quotation marks omitted) (quoting *Friedman*, 283 Md. at 706-07, 393 A.2d at 1359-60).

381. *Id.* at 272-73, 711 A.2d at 865-66.

382. *Id.* at 272, 711 A.2d at 865.

383. *Id.*

384. *Id.*

385. *Id.*

386. *Id.* at 270, 711 A.2d at 864.

dard and toward one of "literal compliance" as found in other jurisdictions.³⁸⁷ Because its jurisdiction over attachment proceedings derives from statute,³⁸⁸ the Court of Appeals appropriately required that creditors literally adhere to the statute's mandates in order to obtain a valid lien of attachment.³⁸⁹

This decision goes beyond mere adherence to Maryland precedent on liens of attachment. While the court in *Evesson, Tonns*, and *Gill* noted that the strict process by which a lien is created must be substantially followed for the lien to be valid before judgment,³⁹⁰ the *Butler* court required literal compliance with the statute. This literal approach more closely follows the statute's intent.

a. Protecting Good Faith Purchasers.—By requiring literal compliance with Maryland's attachment rule, the *Butler* court protected good faith purchasers from bearing the burden of an improperly laid lien. Although the historical function of the attachment procedure may have been to secure payment and to compel an answer to the plaintiff's demand,³⁹¹ the *Butler* court hinted that the need to obtain a valid lien is important in a jurisdiction, such as Maryland,³⁹² where the timing of recordation determines who holds title to a property.³⁹³ If a lien that was improperly obtained and recorded was deemed valid, both debtors and good faith purchasers would like a standard to gauge whether they held good title. Perhaps considering this potential, the *Butler* court cautioned that if it were to rule otherwise, it

387. See *supra* Part 2.a(1) (discussing Maryland's "substantial compliance" approach to the strict compliance standard; see also *supra* Part 2.b (examining jurisdictions' "literal compliance" requirements of strict statutory mandates).

388. See *supra* note 283 and accompanying text.

389. *Butler*, 350 Md. at 270-72, 711 A.2d at 864-65. For an extremely old and seemingly almost forgotten instance when the court required literal compliance with strict statutory standards, see *Prentiss v. Gray*, 4 H. & J. 193 (1816), which held that because the court did not have the authority to accept anything less than literal compliance with the Act, the clerk's unauthorized administration of an oath by which a certificate was provided would not suffice.

390. See *supra* notes 322-327, 337-343 and accompanying text (discussing the facts and holdings of these cases).

391. See *Philbin v. Thurn*, 103 Md. 342, 351, 63 A. 571, 574 (1906) ("The proceeding by attachment . . . is designed to accomplish the two-fold purpose of compelling the appearance of the defendant to answer the plaintiff's demand, and also of giving the plaintiff a security for the payment of his claim").

392. *Butler*, 350 Md. at 273, 711 A.2d at 866.

393. *Id.* (noting that "the deed to the Butlers had been recorded and thus was not subject to the later-filed lien"). Generally speaking, the two other most common types of recording acts are classified as "notice" acts (where a subsequent good faith purchaser prevails over a prior title holder who failed to record) and "race" acts (where whoever records first wins). See JESSE DUKEMINIER & JAMES E. KRIER, *PROPERTY* 711 (3d ed. 1993).

"would encourage plaintiffs seeking to utilize the attachment before judgment procedures to disregard the clear language of Maryland Rule 3-115."³⁹⁴

If the court had held that Tilghman's lien against the Butlers' property was valid despite the filing of the notice prior to the sheriff's return, it would have effectively eliminated the need for formal attachment procedures.³⁹⁵ Such a decision would have breathed life into the notion that a valid lien is created the moment the writ of attachment is placed in the sheriff's hands. This decision would be contrary to the court's holding in *May v. Buckhannon River Lumber Co.* that an enforceable writ is not created by merely issuing a writ of attachment to a sheriff.³⁹⁶ Declining to overturn *May*, the *Butler* court noted:

Had the rule intended that a Notice of Lien of Attachment be filed in the District and circuit courts upon the mere issuance of the writ of attachment, the inclusion of the provisions dealing with the levy and the filing of the sheriff's return would have been unnecessary. It is clear those provisions were inserted to ensure that the sheriff levied on the property prior to the filing of the Notice of Lien of Attachment.³⁹⁷

If courts began enforcing liens that were not obtained according to the provisions of Rule 3-115, good faith purchasers who recorded their deeds first would be unfairly harmed by their subjection to the later-filed lien. In a time where low interest rates spur an active real estate market,³⁹⁸ if courts validated liens obtained outside the established procedure, numerous claims between eager creditors and disgruntled good faith purchasers would arise.

b. Literal Construction, Strict Compliance.—In Maryland, a court's jurisdiction is dependent upon a creditor's strict compliance with the statutory attachment procedures.³⁹⁹ Similarly, other jurisdictions have strictly construed attachment statutes and wisely applied a standard of literal compliance before determining that a creditor's

394. *Butler*, 350 Md. at 272, 711 A.2d at 865.

395. See *infra* text accompanying note 397.

396. *May v. Buckhannon River Lumber Co.*, 70 Md. 448, 448, 17 A. 274, 274-75 (1889).

397. *Butler*, 350 Md. at 272, 711 A.2d at 865.

398. *Housing Starts in July at Fastest Pace Since '87; But the Boom is Expected to Slow Soon; 'Nearly Perfect Conditions,'* BALT. SUN, Aug. 20, 1998, at C1, available in 1998 WL 4981097; (noting that relatively low interest rates were in part responsible for "nearly perfect conditions [in] the residential real estate market").

399. *Evesson v. Selby*, 32 Md. 340, 345 (1870) ("[T]he proceedings in attachment being wholly statutory, and in contravention to the common law, they must strictly follow the provisions of the statute under which they are authorized.").

lien is valid.⁴⁰⁰ As the *Butler* court recognized, both the *Jepsen* court in Connecticut and the *Bass* court in Maine acknowledged that the statutory procedures for attachment must be followed in order to create a valid lien.⁴⁰¹ By requiring creditors to adhere strictly to the attachment process, the *Butler* court narrowed its definition of strict compliance from one where substantial compliance would suffice to one where only literal compliance will do.

By choosing to interpret *Gill*, *Tonns*, and *Evesson* as stalwarts of "literal" creditor compliance with statutory mandates, the court reinvented a century of case law which found that "substantial" creditor compliance with those requirements would suffice. In so doing, the Court of Appeals heightened the level of compliance that a creditor must meet in order for the creditor's lien to be valid.

Additionally, it is possible to interpret the court's literal adherence standard as necessary not only for jurisdictional reasons but for reasons of fairness as well. Given the existence of Maryland's race-notice statute, it would be unfair for a creditor whose lien is undiscoverable by a title search to take title over a good faith purchaser whose claim is valid on its face. Even if Tilghman's lien was indexed and the Butlers did know about it, the lien would still have been invalid according to the court.⁴⁰² The requirement of strict compliance by creditors seeking to attach property protects both a subsequent purchaser's title in the property as well as the creditor's interests in securing his or her payment. The practice of strict compliance should, therefore, be adopted by all creditors to protect themselves in the event a debtor deeds his or her property to an unknowing purchaser for value before judgment is granted on a creditor's lien.

5. *Conclusion.*—The *Butler* court confirmed the necessity of strictly complying with the attachment procedures set forth by the Maryland legislature in Rule 3-115. In so holding, the Court of Appeals followed precedent established in Maryland and other jurisdictions that requires the practice of strict compliance for creditors seeking to attach property as security for payment of debts. Although the court did not address the issue, its ruling protects the integrity of Maryland's race-notice statute by guarding the rights of good faith purchasers from creditors' liens which are not attached, recorded, or indexed properly. While the court's ruling provides important pro-

400. See *supra* Part 2.b (discussing cases from other jurisdictions demanding strict compliance with attachment statutes).

401. See *Butler*, 350 Md. at 270-72, 711 A.2d at 864-65.

402. *Id.* at 272, 711 A.2d at 865.

tection to good faith purchasers, it also retains safeguards for creditors who await judgment on liens acquired by following the proper attachment procedures.

FRANCIE COHEN SPAHN

III. CONTRACTS

A. *The Meaning of "Arising Out of" in Indemnification Clauses*

In *Mass Transit Administration v. CSX Transportation, Inc.*,¹ the Court of Appeals held that an indemnification clause in a procurement contract between a railroad and a state transit authority providing for indemnification from liability "arising out of" work under the contract was to be interpreted under a "physical causation or causation in fact" standard.² Proof of proximate cause, while a requisite for tort liability, is unnecessary to satisfy this contract law standard.³ "But for" causation is all that is required. In other words, the Court of Appeals will not accept an intermediate standard of causation to narrow the definition of "arising out of." For the time being, practitioners should be wary of the potentially broad applications of "arising out of" language in indemnification agreements and perhaps think more carefully about expressly carving out tightly worded exceptions.

1. *The Case.*—On October 1, 1990, the Mass Transit Administration (MTA) executed a Commuter Rail Passenger Service Agreement (Contract) with CSX Transportation, Inc. (CSXT), the successor to the Baltimore & Ohio Railroad.⁴ The Contract provided for CSXT to run and maintain MARC commuter train service, along with its managing, operating, and supporting staff and facilities, between Baltimore and Washington and between Martinsburg, West Virginia and Washington. Under the Contract, MTA agreed to "indemnify, save harmless, and defend CSXT from any and all casualty losses, claims,

1. 349 Md. 299, 708 A.2d 298 (1998).

2. *Id.* at 321, 708 A.2d at 309.

3. *Id.* The Court of Appeals has previously described this requirement: The words "arising out of" must be afforded their common understanding, namely, to mean originating from, growing out of, flowing from, or the like. While these words plainly import a causal relation of some kind, read in context, they do not require that the unloading of the truck be the sole "arising out of" cause of the injury; they require only that the injury arise out of the . . . employee's unloading of the truck This is so regardless of whether the injury may also be said to have arisen out of other causes further back in the sequence of events The exclusion also applies irrespective of the theory of liability by which [claimant] seeks redress for his injury, as the policy exclusion is *not concerned with theories of liability*.

Northern Assurance Co. of Am. v. EDP Floors, Inc., 311 Md. 217, 230-31, 533 A.2d 682, 688-89 (1987) (citations omitted) (emphasis added).

4. CSX, 349 Md. at 300-01, 708 A.2d at 299. CSXT's primary obligations under the Contract included providing "regularly scheduled daily commuter rail service on weekdays This train operation, plus the maintenance of equipment, access of and use of facilities . . . and other activities required to support the operation of the train service . . . shall be called the 'Contract Service.'" *Id.* at 301, 708 A.2d at 299.

suits, damages or liability of every kind *arising out of* the Contract Service.”⁵ In turn, CSXT agreed to submit to MTA for approval “[a]ny proposed settlement or payment in excess of Ten Thousand Dollars.”⁶ MTA also agreed to self-insure for \$5 million per casualty incident, as well as obtain an excess liability policy of \$145 million, with CSXT as an additional insured for CSXT’s operations under the Contract.⁷

On November 4, 1992, CSXT hired a contractor, Melvin Benhoff Sons, Inc. (Benhoff), to pave four public road crossings over CSXT’s tracks.⁸ Less than two months later, a MARC train operated by CSXT hit and destroyed a Benhoff backhoe left on one of the tracks that Benhoff was repaving.⁹ The dispatcher had not received advance notice of the repaving work on the tracks in order to warn the MARC train operators.¹⁰ Benhoff sued CSXT in the Circuit Court for Howard County for the value of the backhoe, \$40,420.25, and finally settled for \$23,230.¹¹ CSXT agreed to the settlement with MTA’s knowledge and without admitting its negligence.¹²

While CSXT litigated Benhoff’s claim, it filed a third-party indemnity claim against MTA in the Circuit Court for Howard County¹³ on two grounds: (1) that the work CSXT contracted Benhoff to perform was necessary to CSXT’s performance under the Contract, and (2) that the MARC train that struck the Benhoff’s backhoe was performing work under the Contract.¹⁴ The Circuit Court for Howard County held the third-party claim in abeyance, agreeing with MTA’s position that the indemnity case properly belonged before the Maryland State Board of Contract Appeals (BCA).¹⁵ CSXT filed its claim for reim-

5. *Id.* at 301, 708 A.2d at 300 (internal quotation marks omitted) (quoting the contract between MTA and CSXT).

6. *Id.* at 300, 708 A.2d at 300.

7. *Id.* at 302, 708 A.2d at 300.

8. *Id.*

9. *Id.* at 303, 708 A.2d at 300-01; see *In re CSX Transp., Inc.*, No. 1771, slip op. at 1-2 (Md. Bd. Contract App. Jan. 3, 1995) (explaining that “MARC” is an acronym for the Maryland Rail Commuter, and that under the contract, CSXT operated the MARC on runs “between Baltimore and Washington, D.C., and between Washington, D.C. and Martinsburg, West Virginia, on tracks and using station facilities owned by CSXT, CSXT and Mass Transit Administration rolling stock, CSXT employees, and CSXT maintenance facilities”).

10. The BCA and Court of Special Appeals determined that the MARC train was not operated negligently. CSX, 349 Md. at 303, 305, 708 A.2d at 301-302.

11. *Id.* at 304, 708 A.2d at 301 (noting that the MTA agreed the settlement amount was “reasonable”).

12. Joint Record Extract at 2, *CSX Transp., Inc. v. Mass Transit Admin.*, 111 Md. App. 634, 683 A.2d 1127 (1996) (No. 1779).

13. *Id.* at 6-7.

14. CSX, 349 Md. at 304, 708 A.2d at 301.

15. Joint Record Extract at 7, *CSX* (No. 1779).

bursement of the Benhoff settlement amount, as well as attorney and interest fees, with an MTA Procurement Officer, who rejected the claim.¹⁶ The Procurement Officer denied CSXT's claim under the indemnity clause of the Contract for two reasons: (1) he determined that the indemnity clause did not cover liabilities caused by CSXT's sole negligence, and (2) the "track maintenance activities" at issue during the Benhoff construction were not "Contract Service" but "general business activity" of CSXT. While this activity may have been necessary as a prerequisite to CSXT's ability to perform its obligations under the contract, i.e., to make its rail facilities "available," it primarily supported CSXT's responsibilities in its other lines of work, for example, freight movement.¹⁷ CSXT then appealed to the BCA, which affirmed the Procurement Officer's decision.¹⁸

The BCA agreed with the Procurement Officer that "[t]he mere fact that a MARC train was innocently and fortuitously involved in the incident does not bring the incident within the ambit of the definition of 'contract service' under the Contract . . . the construction work was not sufficiently significant to the performance of the provision of the Contract Service to require indemnification. Contract Service is not defined specifically . . . [and] the Contract is silent on track maintenance and upgrades."¹⁹ As to the issue of sole negligence coverage, the BCA stated that "[w]e understand that by entering into this Contract the State has agreed to indemnify a private party for its own negligence with taxpayer dollars."²⁰

The Circuit Court for Howard County affirmed the BCA's decision, and CSXT appealed to the Court of Special Appeals, which reversed the Circuit Court's decision.²¹ The Court of Special Appeals agreed with CSXT's argument that, "the December 18, 1992 collision arose out of 'Contract Service' because the collision involved a MARC train and 'Contract Service' specifically includes 'train operations.'"²² Furthermore, the Court of Special Appeals held that the indemnification agreement was not related to or "collateral to" a construction contract, and, therefore was not barred by section 5-305 of the Courts

16. *Id.*

17. *Id.* at Exh. I, p.6.

18. *Id.* at 7.

19. *Id.* The BCA decision noted that "counsel for CSXT stated his belief that approximately 15-20% of the traffic over CSXT rail lines in the Baltimore/Washington/Frederick corridors involved the MARC commuter service." *Id.*

20. *Id.*

21. CSX, 349 Md. at 305, 708 A.2d at 301-02.

22. *Id.*, 708 A.2d at 302 (quoting CSX Transp., Inc. v. Mass Transit Admin., 111 Md. App. 634, 640, 683 A.2d 1127, 1129 (1996)).

and Judicial Proceedings Article.²³ MTA petitioned for certiorari to the Court of Appeals to review the question whether CSXT's liability to Benhoff "arose out of" its service under the Contract, thus requiring MTA to indemnify CSXT for the loss incurred, and whether section 5-305 of the Courts and Judicial Proceedings Article barred CSXT's indemnity claim.²⁴

2. *Legal Background.*—

a. *Construing the "Arising Out Of" Language in Insurance Policies.*—Since 1964, the Court of Appeals has interpreted the phrase "arising out of," or similar language, in a number of insurance cases, particularly those involving automobile policies. In *National Indemnity Co. v. Ewing*,²⁵ a driver with a passenger in his car had an accident on a snow-covered road.²⁶ After parking the car on the side of the road, the driver went to help his passenger, who was thrown from the car during the accident.²⁷ While leading his passenger down the road, another car hit the two men and their parked car.²⁸ The ensuing lawsuit turned on whether the first driver's automobile insurance policy for "bodily injury . . . caused by accident and arising out of the ownership, maintenance, or use of the automobile"²⁹ covered the passenger's injuries from the second accident, when the passenger was not injured during the first accident.³⁰ The Court of Appeals held that a "sufficient nexus was shown" that the "ejection of [the passenger] . . . did not break the chain of use" of the automobile negligently driven by the first driver.³¹ The Court of Appeals looked to workmen's com-

23. *Id.* Section 5-305 of the Courts and Judicial Proceedings Article voids and prohibits enforcement of indemnification clauses in contracts "relating to the construction, alteration, repair, or maintenance of a building, structure, appurtenance or appliance, including moving, demolition and excavating" MD. CODE ANN., CTS. & JUD. PROC. § 5-305 (1995).

24. CSX, 349 Md. at 306, 708 A.2d at 302.

25. 235 Md. 145, 149, 200 A.2d 680, 682 (1964) (stating that the interpretation of the "arising out of" language in an automobile insurance policy was a case of first impression).

26. *Id.* at 147, 200 A.2d at 681.

27. *Id.* at 147-48, 200 A.2d at 681 (stating that the injured passenger was "incoherent" but not injured after the accident).

28. *Id.* at 148, 200 A.2d at 681 (noting that the driver of the second car had been drinking).

29. *Id.* at 147, 200 A.2d at 680.

30. *Id.* at 149, 200 A.2d at 682. A jury found that "Ewing was negligent in the operation of his car in running off the road, but Bridge was not injured in the first accident; . . . that Ewing was guilty of concurrent negligence in the second accident; and that Bridge was not negligent." *Id.* at 148, 200 A.2d at 681. Bridge was Ewing's passenger. *Id.* at 147, 200 A.2d at 681.

31. *Id.* at 150, 200 A.2d at 682-83.

pensation cases, in which the words arising out of have been "given a broad construction."³² In automobile cases, "the words import and require a showing of causal relationship," and "recovery is not limited by the strict rules developed in relation to direct and proximate cause."³³ Looking to cases from other states, the Court of Appeals noted that:

the chain of responsibility must be deemed to possess the requisite articulation with the use or operation until broken by the intervention of some event which has no direct or substantial relation to the use or operation, . . . and until an event of [this] nature transpires the liability under this policy exists.³⁴

The court then stated that the only question under consideration was one of "cause and effect," suggesting that "but for" causation was all that was required for liability to be considered as having "arisen out of" an event.³⁵

In *Frazier v. Unsatisfied Claim & Judgment Fund Board*,³⁶ a mother and child were injured after an unknown driver in another car threw a firecracker into their car.³⁷ The mother was "[d]istracted by the explosion and by [the child's] cries, [and the mother] lost control of her car and hit a tree."³⁸ After unsuccessfully attempting to ascertain the identity of the other driver, the mother sued the Unsatisfied Claim and Judgment Fund Board (the Board) to cover the accident.³⁹ The statutory provision for an action to be brought against the Board required that "the death of, or personal injury to, any person arises out of the ownership, maintenance or use of a motor vehicle in this State."⁴⁰ The Circuit Court for Anne Arundel County determined "as a matter of law, that the injuries sustained did not arise out of the ownership, maintenance and use of the unidentified car."⁴¹ On appeal, the Court of Appeals "conclude[d] that for purposes of determining whether leave to sue the Board should have been granted, the injuries under the facts of this case did arise out of the ownership,

32. *Id.* at 149, 200 A.2d at 682.

33. *Id.*

34. *Id.* at 149-50, 200 A.2d at 682 (quoting *Merchants Co. v. Hartford Acc. & Indem. Co.*, 188 So. 571, 572 (Miss. 1939).

35. *Id.* at 150, 200 A.2d at 683.

36. 262 Md. 115, 277 A.2d 57 (1971).

37. *Id.* at 116, 277 A.2d at 58.

38. *Id.*

39. *Id.* at 116-17, 277 A.2d at 58.

40. *Id.* at 117, 277 A.2d at 58.

41. *Id.*

operation or use of an unidentified motor vehicle"⁴² and therefore held that the mother could sue the Board.⁴³ The Court of Appeals's decision "turn[ed] on the question whether the use of an automobile is directly or merely incidentally causally connected with the injury, even though the automobile itself may not have proximately caused the injury."⁴⁴

In *Aragona v. St. Paul Fire & Marine Insurance Co.*,⁴⁵ judgment creditors brought suit against an attorney's malpractice insurer to cover losses resulting from the misappropriation of funds by the attorney's partner.⁴⁶ The insurance policy covered liabilities "arising out of the performance of professional services for others," but excluded coverage of any "dishonest, fraudulent, criminal or malicious act or omission of the Insured, any partner or employee."⁴⁷ The Court of Appeals held that the exclusion applied to the case, reasoning that the attorney's partner was the "direct and precipitating cause of the loss; . . . the negligence of [the attorney] may have . . . been a contributing cause of the loss [but] . . . it was indirect and remote at best."⁴⁸ Furthermore, the Court of Appeals stated that the fact the attorney "may have been liable for his negligence to the Aragonas does not determine whether his liability is within the coverage of the policy."⁴⁹ Both statements suggest that "arising out of" requires a direct causation standard, not a proximate cause one.

Northern Assurance Company of America v. EDP Floors, Inc.,⁵⁰ a more recent case, involved an employer's commercial general liability policy with an exclusionary clause against "bodily injury or property damage arising out of the ownership, maintenance, operation, use loading or unloading of . . . any automobile."⁵¹ In *EDP Floors*, an employee unloading a truck was injured by floor tiles that fell off a hydraulic lift at the rear of the truck. Another employee, who was allegedly intoxi-

42. *Id.* at 119, 277 A.2d at 59.

43. *Id.* at 120, 277 A.2d at 60.

44. *Id.* at 118, 277 A.2d at 59.

45. 281 Md. 371, 378 A.2d 1346 (1977).

46. *Id.* at 372-73, 378 A.2d at 1347. The Aragonas, the judgment creditors, were beneficiaries of a partnership escrow account from which the partner misappropriated funds. *Id.*

47. *Id.* at 372, 378 A.2d at 1347.

48. *Id.* at 379, 378 A.2d at 1351 (stating that "the [insurance company and attorney] intended . . . that any loss which resulted from any dishonest or criminal act of the insured's partner was excluded from coverage, and that the exclusionary clause . . . was all-encompassing in this respect").

49. *Id.*

50. 311 Md. 217, 533 A.2d 682 (1987).

51. *Id.* at 224-25, 533 A.2d at 686.

cated, was operating the lift at the time of the accident.⁵² The injured employee sued the employer.⁵³ The employer notified both its general liability insurance carrier and its automobile insurance carrier for coverage of the accident, which both insurers denied.⁵⁴ The employer sought a declaratory judgment, claiming that its general insurance carrier owed it a legal defense in the injured employee's suit against the employer, as well as payment of any judgment against the employer.⁵⁵

The Court of Appeals held that the exclusionary clause applied to the facts of the case.⁵⁶ The court stated that "[t]he words 'arising out of' must be afforded their common understanding, namely, to mean originating from, growing out of, flowing from, or the like."⁵⁷ Therefore, "although these words plainly import a causal relation of some kind," the insurance policy did not "require that the unloading of the truck be the sole 'arising out of' cause of the injury; [the policy] require[s] only that the injury arise out of the unloading of the vehicle" as a minimum threshold question.⁵⁸ So that there was no mistake as to how the Court of Appeals interpreted "arising out of," it reiterated its position that tort causation analysis was inapplicable to an interpretation of the insurance policy exclusionary clause. The court stated that the exclusionary clause applied to this case "regardless of whether the injury may also be said to have arisen out of other causes further back in the sequence of events" and "irrespective of the theory of liability . . . as the [insurance] policy exclusion is not concerned with theories of liability."⁵⁹ Again, the Court of Appeals seemed to suggest that it was unwilling to apply a tort causation analysis to an insurance contract. If anything, it was only willing to apply a physical or direct-causation analysis. As the Court of Appeals succinctly put it, "[a]s we see it, the language . . . clearly focuses the 'arising out of' inquiry on the instrumentality of the injury."⁶⁰

b. Construing "Arising Out Of" in Other States.—The Court of Appeals's decision in *CSX* looked to cases interpreting the words "arising out of" that were decided in other jurisdictions. Two examples are

52. *Id.* at 220, 533 A.2d at 684.

53. *Id.*

54. *Id.* at 221, 533 A.2d at 684.

55. *Id.*

56. *Id.* at 231, 533 A.2d at 689.

57. *Id.* at 230, 533 A.2d at 688 (citations omitted).

58. *Id.*

59. *Id.*

60. *Id.*

*Chesapeake & Potomac Telephone Co. v. Allegheny Construction Co.*⁶¹ and *O'Connor v. Serge Elevator Co.*⁶² In *C&P Telephone*, the United States District Court for the District of Maryland, applying Pennsylvania law, held that an agreement for a construction subcontractor to indemnify C&P Telephone for "all liability 'arising from said work, or from any act or negligence of' [the subcontractor]" did not include coverage of liabilities incurred as a result of C&P Telephone's sole negligence.⁶³ The liability incurred by C&P Telephone involved a construction worker who was injured when a rotted telephone pole fell on top of him.⁶⁴ C&P Telephone was potentially solely negligent because it knew or should have known that the telephone pole that collapsed was in a deteriorated condition for a year prior to the accident.⁶⁵ Whether C&P Telephone was entitled to indemnity under the indemnification clause focused on the issues of sole negligence coverage and "whether the injuries alleged by [the construction worker] are injuries 'arising out of' the operations."⁶⁶ Only one prior Pennsylvania case interpreted "arising out of," explaining that it "means causally connected with, not proximately caused by. 'But for' causation, i.e., a cause and result relationship is enough to satisfy this provision of the policy. . . . But for the fact of its being so used on this occasion, [the other driver's] automobile would not have collided with it."⁶⁷ Therefore, the injured construction worker claimed that he would not have been injured "but for" the fact that he had to perform work on the telephone pole.⁶⁸ However, in *C&P Telephone*, the court also applied Pennsylvania law whereby "words of general import do not constitute an assumption by the indemnitor of liability for the indemnitee's own negligence."⁶⁹ Therefore, the court concluded that because the contract did not expressly include coverage of liabilities "arising out of" the contractor C&P's sole negligence,⁷⁰ contractor

61. 340 F. Supp. 734 (D. Md. 1972) (applying Pennsylvania law).

62. 444 N.E.2d 982 (N.Y. 1982).

63. *C&P Telephone*, 340 F. Supp. at 737.

64. *Id.* at 738.

65. *Id.*

66. *Id.* at 741.

67. *Id.* (quoting *Manufacturers Cas. Ins. Co. v. Goodville Mut. Cas. Co.*, 170 A.2d 571 (Pa. 1961) (emphasis added)); see also *Township of Springfield v. Ersek*, 660 A.2d 672, 676 (Pa. Commw. Ct. 1995) ("Arising out of" has been defined as causally connected with, not proximately caused by.).

68. *C&P Telephone*, 340 F. Supp. at 742.

69. *Id.* at 744 (citation omitted).

70. *Id.* at 743-44 ("The indemnification provision in the . . . agreement does not affirmatively and specifically provide that Allegheny will hold C&P harmless for C&P's own negligence. Nor does the agreement contain any 'clearly expressed or unequivocal' language to that effect." (footnote omitted)).

C&P was not entitled to an indemnity from the subcontractor in this instance even though the court agreed that the injury "arose out of" work done under the contract.⁷¹ In other words, the court determined the injury itself "arose out of" contract work under a "but for" standard, but the court implied an exclusion for sole negligence of C&P by virtue of the fact that it was not expressly included in the contract. In dicta, the court stated that, even if Maryland law applied, it believed the outcome of the case would be the same.⁷²

In *Serge Elevator Co.*, a drywall subcontractor's employee was struck by an elevator on his way out of the construction project site for a lunch break.⁷³ The injured employee brought suit against the general contractor, which then sought indemnification from the drywall subcontractor under the indemnity clause contained in their contract.⁷⁴ Specifically, the indemnification clause "included personal injuries 'arising out of the work which is the subject of this contract.'"⁷⁵ The New York Court of Appeals determined that the subcontractor's indemnification clause applied, holding that "[t]he contract could not be performed . . . unless A&M's employees could reach and leave their workplaces on the job site. The instant injuries, occurring during such a movement, must be deemed as a matter of law to have arisen out of the work."⁷⁶ Under New York law, the causation standard seemed to be met unquestionably by the mere fact that the drywall subcontractor's employee was struck by the elevator, suggesting that a physical causation standard was at work, which would also be met with a "but for" causation analysis.

Overall, it is generally agreed that "[t]he words 'arising out of' . . . are not words of narrow and specific limitation, but are broad, general, and comprehensive terms effecting broad coverage."⁷⁷ In order to satisfy "arising out of,"

courts have only required that some form of causal relationship exist between the insured vehicle and the accident. However, liability does not extend to results distinctly remote, though within the line of causation.

The words "arising out of" when used in such a provision are of broader significance than the words "caused by,"

71. *Id.* at 742.

72. *Id.* at 740; see also *supra* note 67.

73. *O'Conner v. Serge Elevator Co.*, 444 N.E.2d 982, 983 (N.Y. 1982).

74. *Id.* The general contractor sued the elevator subcontractor under the indemnification clause contained in their contract, but that suit was dismissed. *Id.*

75. *Id.*

76. *Id.*

77. 7 AM. JUR. 2D *Automobile Insurance* § 161 (1997).

and are ordinarily understood to mean originating from, incident to, or having connection with⁷⁸

Other states seem to have adopted a "but for" causation analysis. In *Indemnity Insurance Co. of North America v. Koontz-Wagner Electric Co.*,⁷⁹ an action was brought by the insurer as subrogee of a contractor employed by a company to remove electric light fixtures.⁸⁰ An employee of the contractor was injured while erecting scaffolding on the company worksite when a company employee drove a truck against the scaffolding.⁸¹ The contract between the company and the contractor included a clause whereby the contractor agreed to "indemnify and protect the Buyer against the . . . demands for injuries or damages to any person . . . growing out of the performance of this order. . . ."⁸² The Court of Appeals for the Seventh Circuit affirmed the district court's decision that the employee's "injuries grew out of the performance of [the contractor's] contract with [the company]."⁸³ In reaching its decision, the Seventh Circuit reasoned that the phrase "growing out of" is "equivalent to the words 'resulting from or arising in connection with.'"⁸⁴ In the absence of Indiana case law on point, the court looked to Illinois, Wisconsin, and Minnesota case law to support this interpretation.⁸⁵

In *Myers v. Burger King Corp.*,⁸⁶ Burger King contracted with a construction company to renovate one of its stores.⁸⁷ An employee of the contractor was injured by a menu board while working on the store renovations.⁸⁸ The employee sued Burger King, and Burger King filed third party claims against the contractor and the contractor's insurance company.⁸⁹ Under the terms of the contract between the contractor and Burger King, the contractor was to have insured Burger King against any "claims which arise from the Contractor's opera-

78. 6B JOHN ALAN APPLEMAN & JEAN APPLEMAN, *INSURANCE LAW AND PRACTICE* § 4317, at 360-63 (Richard B. Buckley ed., 1979) (citations omitted); see also 8 LEE R. RUSS & THOMAS F. SEGALLA, *COUCH ON INSURANCE* § 119:33 (3d ed. 1997) ("It has been stated in a few cases that the words 'arising out of' . . . generally mean 'originating from,' 'growing out of,' or 'flowing from.'").

79. 233 F.2d 380 (7th Cir. 1956).

80. *Id.* at 381.

81. *Id.* at 382.

82. *Id.* at 381-82.

83. *Id.* at 383.

84. *Id.* (citation omitted).

85. *Id.* at 383-84 (citations omitted).

86. 618 So. 2d 1123 (La. Ct. App. 1993).

87. *Id.* at 1124.

88. *Id.*

89. *Id.*

tions, whether such operations be by . . . anyone directly or indirectly employed [by the contractor or subcontractor].”⁹⁰ The contractor argued that the employee’s injury did not “arise from” the contractor’s operations, but from Burger King’s negligent hanging of the menu board.⁹¹ The Court of Appeals of Louisiana disagreed with the contractor and held that “[t]he ‘arising out of’ language in the contract is sufficiently broad enough to cover this situation” because the contractor admitted in his deposition that “[the contractor] was working on the menu board when it fell on Myers.”⁹²

In *Faber v. Roelofs*,⁹³ an automobile insurance policy case, a private elementary school pupil “ran out into the street alongside his school bus, slipped, and fell under the wheels.”⁹⁴ The bus was hired by the independent school district,⁹⁵ which was named as an additional insured under the bus owner’s automobile policy.⁹⁶ The insurance policy covered “bodily injury . . . sustained by any person, caused by accident and arising out of the ownership, maintenance or use of the automobile.”⁹⁷ The Supreme Court of Minnesota determined that the pupil “was run over by the insured vehicle. The causal relation is present [the automobile insurance] policy affords coverage.”⁹⁸ In reaching its conclusion, the Supreme Court of Minnesota quoted Long’s *The Law of Liability Insurance*.⁹⁹

The phrase “arising out of” is not to be construed to mean “proximately caused by.” The thought expressed by the words “arising out of the use of an automobile” is comprehensive and broad in service. The phrase itself is much broader than a phrase such as “proximately caused by the use of the automobile.” The words “arising out of” mean causally connected with, not “proximately caused by” use. “But for” causation, i.e., a cause and result relationship is enough to satisfy the provision of the policy.¹⁰⁰

90. *Id.* at 1124-25.

91. *Id.* at 1128.

92. *Id.*

93. 250 N.W.2d 817 (Minn. 1977).

94. *Id.* at 819.

95. *Id.*

96. *Id.*

97. *Id.*

98. *Id.* at 823.

99. *Id.* at 822 (quoting 1 ROWLAND H. LONG, *THE LAW OF LIABILITY INSURANCE* § 1.22, at 1-57 (1986)).

100. *Id.*

Schmidt v. Utilities Insurance Co.,¹⁰¹ upon which the *Ewing* court relied, concerned the applicability of automobile insurance policy coverage when a pedestrian fell over triangular wooden blocks left by a company truck.¹⁰² The blocks were used as a ramp to back the truck up onto the sidewalk for unloading purposes. The company's automobile insurance policy covered bodily injury "caused by accident and arising out of the ownership, maintenance, or use of the automobile."¹⁰³ The Supreme Court of Missouri held that "[a]lthough the negligent disposition of the blocks could be viewed as the proximate cause of the claimant's injuries, 'the acts of disposition grew out of or arose from the use of the trucks, as trucks.'"¹⁰⁴ The Supreme Court of Missouri reasoned that "[t]he words 'arising out of,' . . . are ordinarily understood to mean 'originating from' or 'having its origin in,' 'growing out of' or 'flowing from.'"¹⁰⁵ The Supreme Court of Missouri explained that "[t]he injury, of course, did not arise out of the use of the trucks if it was directly caused by some independent act, or intervening cause wholly disassociated from, independent of and remote from the use of the trucks. . . . In this case . . . it may not be said as a matter of law that the negligent acts of the truck drivers . . . were entirely disconnected from and disassociated with the ownership, maintenance or use of the trucks."¹⁰⁶

A more recent Missouri case, *American Family Mutual Insurance Co. v. Shelter Mutual Insurance Co.*,¹⁰⁷ involved a homeowner's insurance policy versus automobile insurance policy coverage interpretation. The case centered around a dispute over which insurance policy was to provide coverage of an accident on a residential property that involved a truck. The injured party was helping carry a transmission from a truck down a driveway to a body shop when he fell and crushed his hand, severing his pinky from his hand. The body shop was located on the premises of a residence. The homeowner's insurance "policy excluded coverage for bodily injury 'arising out of the ownership, entrustment, maintenance, operation, use, loading of . . . any type of motor vehicle.'"¹⁰⁸ The Missouri Court of Appeals held that the accident was covered under the automobile insurance policy and

101. 182 S.W.2d 181 (Mo. 1914).

102. See *infra* notes 104-114 for a discussion of *Ewing*.

103. *Schmidt*, 182 S.W.2d at 182.

104. CSX, 349 Md. at 314, 708 A.2d at 306 (quoting *Schmidt*, 182 S.W.2d at 181-82); see also *infra* note 110 and accompanying text.

105. *Schmidt*, 182 S.W.2d at 184.

106. *Id.*

107. 747 S.W.2d 174 (Mo. Ct. App. 1988).

108. *Id.* at 175.

excluded from coverage under the homeowner's insurance policy.¹⁰⁹ The Missouri Court of Appeals followed *Schmidt* in reaching its decision "that the injuries were incident to and a consequence of the unloading of the . . . pickup truck."¹¹⁰ The Missouri Court of Appeals explained that not only was the truck used to deliver the transmission, "[t]he use of the truck was *necessary* to deliver the transmission, and without the use of the truck, the transmission would not have been located on the premises."¹¹¹

In a New Hampshire case, *Union Mutual Fire Insurance Co. v. King*,¹¹² the central issue for the court was whether a slip and fall accident that occurred on a driveway "arose out of the ownership, maintenance or use of the automobile," and thus was covered under the insured party's automobile insurance policy and not their homeowner's insurance policy which excluded "loss arising out of the ownership, maintenance, operation, use, loading or unloading of . . . any automobile . . . at the premises."¹¹³ The injured party was sent to the house of the insured party in order to start a car in the garage that had a dead battery.¹¹⁴ The injured party attempted to push the car out of the garage and up the driveway when he slipped on ice and was injured.¹¹⁵ The Supreme Court of New Hampshire held that the automobile insurance policy was to provide coverage of the accident because

The [automobile insurance] policy provided coverage for accidents arising out of the ownership, maintenance or use of the [insured party's] automobile. Such a clause has been interpreted by this court to mean accidents originating from, or growing out of, or flowing from the use or maintenance of the insured vehicle. . . . A finding that the injury was directly and proximately caused by its use or maintenance is not required. . . . All that is necessary is that the accident was causally connected with the use or maintenance of the insured vehicle.¹¹⁶

109. *Id.* at 178.

110. *Id.* at 177 (quoting *Schmidt*, 182 S.W.2d at 184, and stating that "although proximate causation in the strict legal sense is not required, there must be some causal connection between an injury and the 'use' of a vehicle in order for there to be coverage").

111. *Id.* at 178 (emphasis added).

112. 300 A.2d 335 (N.H. 1973).

113. *Id.* at 335-36.

114. *Id.* at 336.

115. *Id.*

116. *Id.* (citations omitted).

New Jersey follows a similar line of reasoning. In *Scarfi v. Aetna Casualty & Surety Co.*,¹¹⁷ which cited the Maryland Court of Appeals decision in *EDP Floors* favorably,¹¹⁸ the Superior Court of New Jersey examined an exclusionary clause in an insurance policy. The clause excluded coverage for bodily injury or property damage "arising out of ownership, operation, or use, loading or unloading" of an automobile.¹¹⁹ Aetna, the insurer in the case, refused to defend or indemnify the insured company which owned a dump truck that struck a school van.¹²⁰ The injured party sued for personal injuries caused by the "allegedly negligent operation of the truck."¹²¹ Subsequently, the directors of the insured company brought suit against Aetna for its failure to indemnify or defend the company in the tort action brought by the injured party.¹²² The Superior Court of New Jersey held that the insured was barred from coverage under the exclusionary clause because under New Jersey law, the insurance policy "clearly did not provide coverage for injuries and damage arising out of the hiring and training of employees in connection with the ownership, operation, use, repair or maintenance of automobiles. . . . The policy clearly was designed to exclude coverage for personal injuries and property damage arising out of automobile accidents."¹²³ In describing an interpretation that gave the policy "its ordinary and usual meaning,"¹²⁴ the New Jersey court stated that "the underlying action for negligent hiring or training was triggered only when [the injured party] was injured as a result of the accident."¹²⁵ In support of its decision, the New Jersey court cited to commercial insurance policy case law in eighteen states and the territory of Puerto Rico.¹²⁶

Similarly, courts in other states, such as Oklahoma,¹²⁷ Pennsylvania,¹²⁸ South Carolina,¹²⁹ and Utah,¹³⁰ have interpreted "arising

117. 559 A.2d 459 (N.J. Super. Ct. App. Div. 1989).

118. *Id.* at 463.

119. *Id.*

120. *Id.* at 460.

121. *Id.* at 460-61.

122. *Id.* at 461.

123. *Id.* at 462.

124. *Id.* at 461.

125. *Id.* at 462-63.

126. *Id.* at 462-64. The eighteen states were New Jersey, Maryland, New York, Indiana, Alaska, Pennsylvania, Georgia, Arizona, Delaware, Hawaii, Illinois, Massachusetts, Michigan, Minnesota, Missouri, Oregon, Texas and Washington, and the territory of Puerto Rico. *Id.*

127. *Wallace v. Sherwood Constr. Co., Inc.* 877 P.2d 632, 634 (Okla. Ct. App. 1994).

128. *Township of Springfield v. Ersek*, 660 A.2d 672, 676 (Pa. Commw. Ct. 1995) (reversing and remanding on the issue of coverage because "[a]rising out of" has been defined as causally connected with, not proximately caused by").

out of" as something akin to a "but for" causal relationship rather than one of proximate cause. None of these states have chosen to equate "arising out of" with "but for" causation in all cases. However, most courts agree that "arising out of" is something less than proximate cause in a tort case. Consequently, what is left is a motley group of terms that casts as wide a net as "but for" causation.¹³¹ Maryland takes a somewhat firmer stance by determining that a discussion of tort causation in what should be a pure contract law case essentially muddies the analysis, but nonetheless comes to a similarly broad conclusion.¹³²

3. *The Court's Reasoning.*—In *CSX*, the Court of Appeals held that an indemnification clause in a procurement contract between a railroad and a state transit authority providing for indemnification from liability "arising out of" work under the contract was to be interpreted under a "physical causation or causation in fact" standard.¹³³ As applied in *CSX*, "arising out of" has "a broader concept" than proximate cause, which the Court of Appeals held to be "an incorrect legal standard."¹³⁴

The Court of Appeals first analyzed whether the indemnification clause in the Contract excluded MTA's indemnification of CSXT for liabilities caused by CSXT's sole negligence.¹³⁵ On this issue, the Court of Appeals decided that "[i]n 'unequivocal terms,' the indemnification . . . includes the liability of CSXT for its own acts or omissions."¹³⁶ No tort causation analysis was necessary because the indemnity was enforceable regardless of whether the accident was due to CSXT's negligence.¹³⁷

129. *McPherson v. Michigan Mut. Ins. Co.*, 426 S.E.2d 770, 771 (S.C. 1993).

130. *Taylor v. American Fire & Cas. Co.*, 925 P.2d 1279, 1282 (Utah Ct. App. 1996).

131. See *supra* notes 57, 67, 83, 104, 116, 125 and accompanying text (discussing the various but similar interpretations of "arising out of" in Maryland and other states).

132. See *infra* notes 100 and 142 and accompanying text (discussing Maryland's process of defining "arising out of" language).

133. *CSX*, 349 Md. at 321, 708 A.2d at 309.

134. *Id.*

135. *Id.* at 306, 708 A.2d at 302.

136. *Id.* at 310, 708 A.2d at 304.

137. MTA also argued that indemnification of CSXT under the Contract for its sole negligence was unenforceable as applied to the facts of this case because Benhoff's contract with CSXT involved construction work, i.e., the repaving of train tracks. *Id.* Therefore, section 5-305 of the Courts and Judicial Proceedings Article rendered the indemnification agreement void and unenforceable. *Id.*; see also *supra* note 3 and accompanying text. The Court of Appeals disagreed, stating that the Benhoff contract was a side agreement, and that the contract, which neither was nor became a construction contract as a result of the side agreement with Benhoff, controlled. *CSX*, 349 Md. at 319-20, 708 A.2d at 308-09. The Court of Appeals concluded that the indemnification clause in this matter

The Court of Appeals next focused on the issue of how to interpret the words "arising out of" used in the indemnification clause. The analysis of "arising out of" contained two components: (1) the general meaning or standard ascribed to the words "arising out of," and (2) the application of "arising out of" to the Contract, i.e. did the liability incurred by CSXT "arise out of" CSXT's Contract Service? In the process, the Court of Appeals devoted a substantial portion of its opinion on deriving its broad definition, while underlining the point that no tort or proximate cause analysis would be used to test whether this requirement was met.¹³⁸

To decipher the general meaning of "arising out of," the Court of Appeals analogized to insurance policies, looking to insurance law treatises and to prior case law both in Maryland and in other states.¹³⁹ In general, the "words 'arising out of' mean 'originating from, growing out of, flowing from, or the like.'"¹⁴⁰ Although the language mimics descriptions used in causation or tort analysis, insurance law interpretation focuses on the scope of the causal relation, and not the legal cause of injury. The insurance law interpretation of the words "arising out of" can have a broader scope than "caused by."¹⁴¹ In that sense, if we were to place "arising out of" on a tort causation scale in order to ascertain the landscape, the application of the words "arising out of" would be satisfied by a "but for" causation analysis rather than a proximate cause analysis.¹⁴²

MTA advocated for the use of an "intermediate" causation standard, lying somewhere between actual causation and proximate cause.¹⁴³ In rejecting MTA's argument, the Court of Appeals stated that MTA never explained "[w]hat that extra quantum must be . . . other than that it is more than 'but for' causation and that it need not reach the level of proximate causation."¹⁴⁴ The court also stated that

was legally enforceable and that section 5-305 of the Courts and Judicial Proceedings Article was irrelevant. *Id.* at 320, 708 A.2d at 309.

138. CSX, 349 Md. at 311-18, 708 A.2d at 304-08 (analogizing to public liability insurance policies and indemnification contracts, which are similarly interpreted).

139. *Id.* at 310-11, 708 A.2d at 304 ("Inasmuch as the indemnification was intended, at a minimum, to serve as liability insurance for CSXT for the first \$5 million of CSXT's liability, it is appropriate to interpret and apply the indemnification in the same manner as liability insurance policies are interpreted and applied.")

140. *Id.* at 311-19, 708 A.2d at 304-08 (quoting *Northern Assurance Co. of Am. v. EDP Floors, Inc.*, 311 Md. 217, 230-31, 533 A.2d 682, 688-89 (1987)).

141. *Id.* at 315, 708 A.2d at 307 (citations omitted).

142. *Id.* at 323, 708 A.2d at 310 (Eldridge, J., dissenting). In his dissent, Judge Eldridge stated that "[t]he majority bases its decision on its conclusion that the phrase 'arising out of' means nothing more than simple 'but for' causation." *Id.*

143. CSX, 349 Md. at 316, 708 A.2d at 307.

144. *Id.* at 306, 708 A.2d at 302.

contract law, not tort law, applied to the indemnification clause, so that only direct causation could satisfy its terms.¹⁴⁵

The dissent disagreed with the majority that “arising out of” was satisfied by “the use of a simple ‘but for’ analysis in this case.”¹⁴⁶ The dissent opined that the Court of Appeals had earlier adopted an “inseparable association” test, which it believed was “far from adopting a ‘but for’ approach.”¹⁴⁷

In the end, the Court of Appeals agreed with CSXT’s argument, interpreting the words “arising out of” as “a physical causation or causation in fact”¹⁴⁸ standard, and declining to accept the MTA’s argument for an intermediate causation standard,¹⁴⁹ or the dissent’s call for an “inseparable association” test.¹⁵⁰

The second component of the “arising out of” issue concerned whether the liability incurred by CSXT “arose out of” the Contract, and therefore entitled CSXT to indemnification by MTA. Although the BCA decided that the Benhoff work was outside of the Contract,¹⁵¹ the Court of Special Appeals concluded that the MARC train operation was work conducted within the scope of the Contract.¹⁵² Because the issue was not disputed at the Court of Appeals level, the Court of Appeals applied the Court of Special Appeals’s finding that “Contract Service” was satisfied.¹⁵³ In any event, the Court of Appeals agreed with the Court of Special Appeals’s finding because “so long as the liability of CSXT arises out of the Contract [], it matters not that MTA [i.e. the MARC train] is not at fault.”¹⁵⁴ Therefore, the Court of Appeals concluded that the accident occurred when the MARC train struck the Benhoff’s backhoe; the MARC train was operated by CSXT, i.e. MTA’s agent; thus MTA was, at the moment of impact, liable for the damage to Benhoff’s backhoe so that CSXT is entitled to indemnification by MTA.

145. *Id.* at 321, 708 A.2d at 309.

146. *Id.* at 324, 708 A.2d at 311 (Eldridge, J., dissenting).

147. *Id.* at 327, 708 A.2d at 312 (citing *Northern Assurance Co. of Am. v. EDP Floors, Inc.*, 311 Md. 217, 231, 533 A.2d 682, 689 (1987)).

148. *CSX*, 349 A.2d at 307, 708 A.2d at 302. CSXT’s argument was that in contract indemnity claims the language ‘arising out of’ triggers a ‘causation in fact’ analysis. *Id.*

149. *Id.* at 306, 708 A.2d at 302.

150. *Id.* at 327, 708 A.2d at 312 (Eldridge, J., dissenting).

151. *CSX*, 349 A.2d at 305, 708 A.2d at 301.

152. *Id.* (“The [Court of Special Appeals] agreed with CSXT’s contention that, notwithstanding the absence of negligence in the operation of the MARC train, ‘the . . . collision . . . involved a MARC train and ‘Contract Service’ specifically includes ‘train operations.’”).

153. *Id.* at 305-06, 708 A.2d at 302 (citation omitted).

154. *Id.* at 317, 708 A.2d at 307; *see also id.* at 317-18, 708 A.2d at 307 (analogizing *CSX* to *Serge Elevator*).

The dissent disagreed, arguing that under a contract law analysis, “[n]o reasonable person would have thought that MTA had agreed to indemnify CSXT” for CSXT’s sole negligence in this matter.¹⁵⁵ The dissent took this position because of the fact that “[t]he tracks were used primarily for trains other than MARC trains.”¹⁵⁶

4. *Analysis.*—In *CSX*, the Court of Appeals held that an indemnification clause in a procurement contract between a railroad and a state transit authority providing indemnity for liability “arising out of” work under the contract was to be interpreted under to a “physical causation or causation in fact” standard.¹⁵⁷ As applied in *CSX*, “arising out of” has “a broader concept” than proximate cause, a tort law concept, which the Court of Appeals deemed to be “an incorrect legal standard.”¹⁵⁸

The Court of Appeals viewed MTA and CSXT as two experienced parties that have the freedom to negotiate the inclusion or exclusion of any express terms of the indemnification clause in their contract.¹⁵⁹ The Court of Appeals therefore inferred from the express language of the contract that MTA and CSXT intended the agreement to cover train collisions,¹⁶⁰ and that the Benhoff accident was covered under the indemnification clause because the accident occurred when the MARC train operated under the Contract Service collided with the Benhoff backhoe.¹⁶¹ The Court of Appeals’s determination that liabilities incurred through the sole negligence of CSXT were not excluded from the indemnification agreement enabled the Court of Appeals to conclude that the alleged omissions of CSXT “do not diminish the fact that the damage to the backhoe *arose out of* the collision with the MARC train.”¹⁶² The Court of Appeals found evidence of MTA’s intent to provide a broad indemnity to CSXT in MTA’s contractual agreement to include CSXT’s Contract work as an additional insured

155. *Id.* at 323, 708 A.2d at 310 (Eldridge, J., dissenting).

156. *Id.*

157. *CSX*, 349 Md. at 321, 708 A.2d at 309.

158. *Id.*

159. *Id.* at 320, 708 A.2d at 309. Discussing the applicability of Md. CODE ANN., CTS. & JUD. PROC. § 5-305 to the MTA and CSXT contract, the Court of Appeals stated that “[a] decent respect for the freedom of sophisticated parties contractually to establish the rules governing their business relationship compels the conclusion that the General Assembly intended contracting parties to be able to determine, when they contract, whether CJ § 5-305 applies to their agreement.” *CSX*, 349 Md. at 320, 708 A.2d at 309.

160. *CSX*, 349 Md. at 310, 708 A.2d at 304.

161. *Id.* at 312, 708 A.2d at 305. The MTA admitted that “the only Contract Service involved in the collision was the operation of the MARC train,” but argued that the cause of the collision was not the operation of the train. *Id.* at 306, 708 A.2d at 302.

162. *Id.* at 312, 708 A.2d at 305 (emphasis added).

under its \$150 million public liability insurance policy.¹⁶³ In other words, the Court of Appeals applied contract law, not tort law principles, to conclude that the business expectations of the parties at the time the contract was entered into was to allocate losses to MTA, so that MTA's role was that of an insurer to CSXT.¹⁶⁴

It is only because of this perceived role of MTA as CSXT's insurer that the Court of Appeals examined insurance liability case law and insurance law treatises to determine whether the indemnification clause applied in the instant case, focusing much of its opinion on interpreting the words "arising out of."¹⁶⁵ Nonetheless, the court's lengthy discussion of the "arising out of" language serves not only to distinguish between contract and tort law analysis of "cause," but also to dispel the notion that, under contract law, the Court of Appeals will not consider anything more than a straightforward cause and effect analysis of the liability at the time of its occurrence.¹⁶⁶

MTA's argument for a more restrictive standard than a basic, physical, "but for" analysis of the accident was not fully supported by the court's analysis in *Ewing* and *Frazier*.¹⁶⁷ In *Ewing*, an automobile insurance liability case, the Court of Appeals held that the passenger's injuries in a second accident "arose out of" the driver's negligent use of the automobile in the first accident.¹⁶⁸ There, the Court of Appeals was "bound by the jury's finding 'that the injuries to the claimant in the second accident were proximately caused by concurrent negligence on the part of the host driver and the third motorist.'"¹⁶⁹ The Court of Appeals accepted the jury's finding because "a sufficient

163. *Id.* at 310, 708 A.2d at 304 ("In addition to the very words used in expressing the indemnification, the fact that it extends to \$150 million clearly indicates that the parties were contemplating a possible disaster, such as a wreck of a train filled with commuters, due to CSXT's negligence.").

164. *Id.* at 310-11, 708 A.2d at 304.

165. *Id.* (citing *Northern Assurance Co. of Am. v. EDP Floors, Inc.*, 311 Md. 217, 533 A.2d 682 (1987)). For a discussion of *EDP Floors*, see *supra* notes 50-60 and accompanying text.

166. *CSX*, 349 Md. at 311-12, 708 A.2d at 305 ("[T]he language in the exclusionary clause clearly focuses the 'arising out of' inquiry on the instrumentality of the injury." (quoting *EDP Floors*, 311 Md. at 230-31, 533 A.2d at 689)). The Court of Appeals in *EDP Floors* held that the injury was excluded from insurance coverage "regardless of whether the injury may also be said to have arisen out of other causes further back in the sequence of events The exclusion also applies irrespective of the theory of liability by which [the claimant] seeks redress for his injury, as the policy exclusion is not concerned with theories of liability." *Id.*

167. *Id.* at 316, 708 A.2d at 307 (citing *National Indem. Co. v. Ewing*, 235 Md. 145, 200 A.2d 680 (1964) and *Frazier v. Unsatisfied Claim & Judgment Fund Bd.*, 262 Md. 115, 277 A.2d 57 (1971), as two "illustrations of 'intermediate causation'").

168. *Ewing*, 235 Md. at 150-51, 200 A.2d at 682-83.

169. *CSX*, 349 Md. at 314, 708 A.2d at 306.

nexus of cause and effect" between the first and second accidents, without any intervening event to "break[] the chain," which resulted in the passenger being injured during the second accident.¹⁷⁰

The court's holding in *Ewing* therefore did not support the application of a proximate cause standard for "arising out of" language in indemnity clauses, but merely stood for the proposition that, in some situations, the finding of proximate cause is sufficient. Thus, the majority in *CSX* elaborated that in *Ewing* "we concluded that 'it has generally been held that, while the words import and require a showing of causal relationship, recovery is not limited by the strict rules developed in relation to direct and proximate cause.'"¹⁷¹ The majority concluded that *Ewing* stands for "simply reject[ing] proximate cause as a predicate for 'arising out of' coverage, without mentioning any need for some lesser fault."¹⁷² The dissent in *CSX*, citing the same passage, stated that in *Ewing*, as in *EDP Floors*, "the Court rejected placing reliance on any form of strict causation analysis."¹⁷³

Nonetheless, MTA presented a second case, *Frazier*, in support of its argument for a more restrictive standard than "but for" causation. In *Frazier*, a mother sued for recovery under the Unsatisfied Claim and Judgment Fund law, which provides for the recovery of "personal injury that 'arises out of' the use of an unidentified motor vehicle."¹⁷⁴ In *Frazier*, the Court of Appeals held that the mother and child's injuries arose out of the "ownership, operation or use of an unidentified motor vehicle" not because of the negligent operation of the automobile, but because the firecracker was thrown from an automobile.¹⁷⁵

The *CSX* majority stated that *Frazier* did not support MTA's argument because the court's decision in *Frazier*, which "dr[ew] on automobile liability coverage cases, held that the Fund was answerable because 'the injuries under the facts of this case did arise out of the . . . use of an unidentified motor vehicle.'"¹⁷⁶ Similar to the instant case, in *Frazier* there was no fault in the operation of the unidentified car, but in what the unidentified driver was doing at the time he or

170. *Ewing*, 235 Md. at 149-50, 200 A.2d at 682.

171. *CSX*, 349 Md. at 313-14, 708 A.2d at 306 (quoting *Ewing*, 235 Md. at 149, 200 A.2d at 682).

172. *Id.* at 316, 708 A.2d at 307.

173. *Id.* at 328-29, 708 A.2d at 313 (Eldridge, J., dissenting) (citing *Ewing*, 235 Md. at 149, 200 A.2d at 682).

174. *CSX*, 349 Md. at 316, 708 A.2d at 307 (citing *Frazier v. Unsatisfied Claim & Judgment Fund Bd.*, 262 Md. 115, 117, 277 A.2d 57, 58 (1971)).

175. *Frazier*, 262 Md. at 119, 277 A.2d at 59.

176. *CSX*, 349 Md. at 316-17, 708 A.2d at 307 (quoting *Frazier*, 262 Md. at 119, 277 A.2d at 59).

she drove the car.¹⁷⁷ The dissent's response was to throw *Frazier* out of the line of relevant cases, further weakening MTA's argument for a more restrictive standard than "but for" causation. The dissent in *CSX* argued that the *Frazier* court's holding that the accident claim could be brought before the Unsatisfied Claim and Judgment Fund was based "on the remedial nature of the Fund and the interest of protecting innocent victims" and did not "draw[] on automobile liability coverage cases."¹⁷⁸

MTA's argument for a new, brightline standard of causation to apply to the contract interpretation of "arising out of" was rejected by the Court of Appeals. Instead of impinging on the parties' freedom to contract, under Maryland law, the courts will "apply the terms of the contract as written," without going "contrary to the intention of the parties."¹⁷⁹ In both *Ewing* and *Frazier*, the Court of Appeals looked at the express language of the insurance agreement and considered the intent of the agreement in order to determine whether it would interpret the language of the agreement and its corresponding scope of coverage broadly or narrowly. Similarly, in *CSX*, the Court of Appeals decided to apply the express, yet broad, language of the indemnity clause to allow coverage of the liability in question because of what it determined to be the intent of a contract between two experienced parties.¹⁸⁰

EDP Floors was the most recent Maryland case prior to *CSX* that looked at an indemnification clause using the "arising out of" language, and the *CSX* majority supports the proposition that "[t]he words 'arising out of' must be afforded their common understanding, namely, to mean originating from, growing out of, flowing from, or the like. . . . This is so regardless of whether the injury may also be said to have arisen out of other causes further back in the sequence of

177. *Id.*; see also *id.* at 330, 708 A.2d at 314 (Eldridge, J., dissenting) (stating, referring to *Frazier*, that "this Court's holding in that limited context should not influence our decision in the case *sub judice*").

178. *Id.* at 330, 708 A.2d at 314 (Eldridge, J., dissenting) (quoting the majority in *CSX*, 349 Md. at 316-17, 708 A.2d at 307).

179. *CSX*, 349 Md. at 312, 708 A.2d at 305 (quoting *Northern Assurance Co. of Am. v. EDP Floors, Inc.*, 311 Md. 217, 231, 533 A.2d 682, 689 (1987)). The Court of Appeals discussed its decision in *EDP Floors*, where it stated that:

When, as here, there is no ambiguity in the policy exclusion, the first principle of construction of insurance policies in Maryland requires that we apply the terms of the contract as written. To apply either a proximate or concurrent cause analysis in the interpretation of the policy exclusion . . . would severely strain its plain import and would result in coverage being provided, contrary to the intention of the parties.

EDP Floors, 311 Md. at 231, 533 A.2d at 689.

180. *CSX*, 349 Md. at 320, 708 A.2d at 309.

events”¹⁸¹ The interpretation of “arise out of” therefore precludes application of “either a proximate or concurrent cause analysis”¹⁸² that would go “further back in the chain of causation.”¹⁸³ Instead, the focus of the “inquiry [is] on the instrumentality of the injury.”¹⁸⁴

In agreement with the *CSX* majority, the dissent in *CSX* pointed out that in *EDP Floors*, the Court of Appeals stated that it would “reject[] relying on a causation based analysis which would defeat the intent of the parties.”¹⁸⁵ Nonetheless, the dissent asserted that an “inseparable association” test was formulated to take the place of a causation-based analysis.¹⁸⁶ However, if the dissent had continued its examination of the *EDP Floors* decision, it would have noted that the test was described as an “inseparable associat[ion] with the operation, use or unloading of the truck” because it flowed from what was deemed the intent of the parties at the time of contract.¹⁸⁷ Thus, the Court of Appeals’s interpretation of “arising out of” in *EDP Floors* was not intended to be a brightline rule for interpreting the words; rather, it was a descriptive interpretation of “arising out of” in line with that particular contract’s intent.¹⁸⁸

In the end, it was the structure and provisions of the MTA-CSXT contract itself that led the Court of Appeals to apply a broad interpretation of “arising out of”¹⁸⁹ consistent with contract law principles of interpretation. Rather than creating a new precedent in case law, the majority applied and reconfirmed existing principles. The dissent opined that the majority’s interpretation was unreasonably broad, even with the case’s special circumstances.¹⁹⁰ The dissent argued that the majority opinion rendered meaningless the numerous other factors that were far more significant in causing the accident, such as CSXT’s hiring practices, negligent train operation, or “profit motivations.”¹⁹¹ In a worst-case scenario, the dissent argued, the majority opinion would hold CSXT harmless even if CSXT had hired unquali-

181. *Id.* at 311-12, 708 A.2d at 305 (quoting *EDP Floors*, 311 Md. at 230-31, 533 A.2d at 688-89).

182. *Id.*

183. *Id.* at 312, 708 A.2d at 305.

184. *Id.*; *EDP Floors*, 311 Md. at 230-31, 533 A.2d at 688-89.

185. *CSX*, 349 Md. at 327, 708 A.2d at 312 (Eldridge, J., dissenting).

186. *Id.*

187. *EDP Floors*, 311 Md. at 231, 533 A.2d at 689.

188. *CSX*, 349 Md. at 325-26, 708 A.2d at 312 (Eldridge, J., dissenting).

189. *Id.* at 323, 708 A.2d at 310.

190. *Id.* (“Such a sweeping interpretation of the phrase ‘arise out of,’ as applied to the facts of this case, is unreasonable.”).

191. *Id.* at 324, 708 A.2d at 311.

fied engineers to run its trains under the contract.¹⁹² But such a scenario was not presented here, nor would any party reasonably intend to contract with a party engaging in such blatantly bad business practices. Presumably, a public authority such as MTA would take reasonable precautionary inquiries to ensure that it does not contract an operator that would hire unlicensed drivers. And perhaps, as a matter of public policy, incentives should exist to encourage the MTA to take such measures, particularly when it chooses to bind itself contractually to an indemnification clause so broadly expressed. The majority's response was that this case involved two experienced parties free to negotiate the express terms of the indemnification agreement.¹⁹³ They were thus held to the express terms of the contract.

5. *Conclusion.*—In *CSX*, the Court of Appeals held that BCA applied the wrong legal standard to the case by “appl[ying] the indemnification provision based on the proximate cause of the collision of the backhoe, without recognizing that the ‘arising out of’ promise in the contract’s indemnification of CSXT was a broader concept.”¹⁹⁴ Not to be confused with a causation analysis to determine negligence, however, the Court of Appeals’s interpretation of “arising out of” is, in tort-speak, close to a “but for” analysis because it relies on a direct or physical link to the accident. This conclusion is supported by the fact that the Court of Appeals will not look to a more narrow standard such as proximate or intermediate causation, or even “inseparable association.” To the Court of Appeals, the default rule is to apply a simple direct cause and effect analysis because a higher standard of analysis not called for by the plain language of the contract is contrary to contract interpretation principles.

Here, insurance contract case law was implicated because the Court of Appeals reasoned that MTA intended to act like an insurer of CSXT and therefore insurance contract case law was analogous.¹⁹⁵ The Court of Appeals construed the scope of “arising out of” in this case in its broadest sense, namely, “physical causation or causation in

192. *Id.* at 323-24, 708 A.2d at 310-11. The dissent warned:

There should be more of a nexus between contract services and CSXT liability than simple ‘but for’ causation before the indemnity provision is triggered. If not, then MTA could be required to indemnify CSXT for a myriad of liabilities in no way closely related to the provision of commuter rail service by CSXT for MTA.

Id. at 323, 708 A.2d at 310.

193. *CSX*, 349 Md. at 309-10, 317, 319-20, 708 A.2d at 303-04, 307-09.

194. *Id.* at 321, 708 A.2d at 310.

195. *Id.* at 310-11, 708 A.2d at 304.

fact”¹⁹⁶ as a result of its reasoning that these two experienced parties intended to be held to the express language of the contract.¹⁹⁷ The Court of Appeals then looked at the facts of how the liability was incurred in order to conclude that it fell within the terms of the agreement.

Experienced parties should be wary of how they craft the language in an indemnification clause, particularly if the parties belong to an industry known to negotiate indemnification clauses in the ordinary course of business. Great care should be taken to state with specificity which liabilities are included or, perhaps more importantly, excluded from the scope of coverage.¹⁹⁸

DEBRA S.P. CHENG

196. *Id.* at 321, 708 A.2d at 309.

197. *Id.* at 310, 708 A.2d at 304.

198. *Id.* at 312, 708 A.2d at 305 (explaining that “the language . . . focuses the inquiry on the instrumentality of the injury,” so that application of a proximate or concurrent cause analysis was contrary to the intent of the parties (quoting *Northern Assurance Co. of Am. v. EDP Floors, Inc.*, 311 Md. 217, 231, 533 A.2d 682, 689 (1987))).

IV. CRIMINAL LAW

A. *Formally Adopting the Single Larceny Doctrine in Maryland*

In *State v. White*,¹ the Court of Appeals examined whether the single larceny doctrine is still recognized in Maryland after the passage of the state's Consolidated Theft Statute.² According to this doctrine, "the taking of property belonging to different owners at the same time and place constitutes but one larceny."³ The court held that this doctrine is part of the Maryland common law of theft; it survived the passage of the Consolidated Theft Statute, and the Court of Special Appeals correctly applied it in this case.⁴ Thus, stealing several articles of property at one time, whether belonging to one owner or several owners, constitutes one offense; it does not constitute as many separate offenses as there are different owners of the property stolen.⁵ The court's ruling clarifies Maryland theft law and is consistent with both precedent and the Maryland Consolidated Theft Statute. Also, the ruling is consistent with the majority of jurisdictions in the United States. The opinion's only shortcoming is its failure to fully discuss the equitable and constitutional reasons for formally adopting the single larceny doctrine.

1. *The Case*.—Carla Price and Patricia McNabb were high school physical education teachers who shared office space with two other teachers at Western Vocational Technical High School in Baltimore County, Maryland.⁶ On August 17, 1995, two items were stolen from their office: a small TV/radio belonging to Carla Price, and a canvas bag decorated with a Baltimore County Teachers Logo belonging to Patricia McNabb.⁷

Around noon on the same day, Detective Edmond Bradley noticed Richard Albert White standing on a street corner about four blocks from the school.⁸ White had a canvas bag between his feet and was closely examining a small TV/radio.⁹ As Detective Bradley ap-

1. 348 Md. 179, 702 A.2d 1263 (1997).

2. See MD. ANN. CODE art. 27, §§ 340-345 (1996). The Consolidated Theft Statute was passed in 1978.

3. See *White*, 348 Md. at 183, 702 A.2d at 1264 (quoting Daniel H. White, Annotation, *Single or Separate Larceny Predicated upon Stealing Property from Different Owners at the Same Time*, 37 A.L.R. 3d 1407, 1409 (1971)).

4. *Id.* at 195-96, 702 A.2d at 1271.

5. *Id.* at 193-94, 702 A.2d at 1270.

6. *Id.* at 181, 702 A.2d at 1264.

7. *Id.*

8. *Id.*

9. *Id.*

proached, White placed the TV/radio in the bag.¹⁰ Detective Bradley identified himself and asked White for identification; White gave his name but did not provide identification.¹¹

Noting the distinctive Baltimore County Teachers Logo on the bag,¹² Detective Bradley radioed for assistance and dispatched an officer to Western Vocational Technical High School to see if anything was reported missing.¹³ Upon learning from a second officer that a TV/radio and a canvas bag were missing from the school, Detective Bradley arrested White for theft.¹⁴

In the District Court for Baltimore County, White was charged with three separate counts: stealing a canvas bag having a value of \$300 or less from Patricia McNabb, stealing a TV/radio set having a value of \$300 or less from Carla Price, and trespassing on posted school property.¹⁵ The case was transferred to the Circuit Court for Baltimore County after White requested a jury trial.¹⁶ The jury returned a guilty verdict on all three counts.¹⁷ The trial court sentenced White to consecutive eighteen-month sentences for each theft count and a concurrent sixty-day sentence for the trespassing count.¹⁸ White appealed the decision, asserting that the trial court erred in failing to merge his two theft convictions.¹⁹

On appeal, the Court of Special Appeals affirmed the judgment, but merged the theft convictions and sentences.²⁰ In doing so, the court agreed with White's contention that the stealing of two pieces of property was "one transaction, and therefore constituted but one offense."²¹ Noting that a majority of courts²² have adopted this principle, known as the single larceny doctrine, the court explained that, although the Maryland Court of Appeals had not expressly adopted

10. *Id.*

11. *Id.*

12. At the sentencing proceeding, it was revealed that Detective Bradley knew White and was aware of prior incidents involving White. *See id.*

13. *Id.*

14. *Id.* at 181-82, 702 A.2d at 1264.

15. *Id.* at 182, 702 A.2d at 1264.

16. *Id.*

17. *Id.*

18. *Id.*

19. *See White v. State*, No. 540, slip op. at 1 (Md. Ct. Spec. App. filed Jan. 8, 1997) (*per curiam*). White also argued that the trial court erred "in refusing to hear his belated motion to suppress evidence." *Id.*

20. *Id.* at 4.

21. *Id.*

22. *See infra* note 72 and accompanying text for examples of other courts following the single larceny doctrine.

this doctrine, the Court of Special Appeals had.²³ Citing *Govostis v. State*,²⁴ the Court of Special Appeals held that the single larceny doctrine applies in Maryland.²⁵

The State appealed the decision, arguing that the Court of Special Appeals erred in applying the single larceny doctrine and in merging the two convictions.²⁶ On appeal, the Court of Appeals considered two questions. First, the court addressed whether “the stealing of several articles of property at the same time, belonging to several owners, constitute[s] one offense, or as many separate offenses as there are different owners of the property stolen?”²⁷ Second, the court considered whether the single larceny doctrine had been abrogated by the enactment of the Maryland Consolidated Theft Statute.²⁸

2. *Legal Background.*—

a. *The Crime of Larceny.*—At common law, larceny consisted of “the wrongful taking and carrying away [of] the chattels of another with a felonious intent to convert them to the taker’s own use.”²⁹ The requisite elements of larceny, in addition to intent, were “a physical

23. See *White*, No. 540, slip op. at 4 (deciding that “the stealing of several articles at one time, irrespective of whether they belonged to one person or many, constitutes one offense”).

24. See *Govostis v. State*, 74 Md. App. 457, 471, 538 A.2d 338, 345 (1988) (holding that stealing a person’s personal effects as well as his car was a single theft because “there was but one criminal scheme and one criminal intent”).

25. *White*, No. 540, slip op. at 4.

26. See *White*, 348 Md. at 182, 702 A.2d at 1264.

27. *Id.* at 180-81, 702 A.2d at 1263 (citing *State v. Warren*, 77 Md. 121, 122, 26 A. 500, 500 (1893)).

28. See *id.* at 180, 702 A.2d at 1263 (asking “whether the ‘single larceny doctrine’ is alive and well in Maryland under the Consolidated Theft Statute”). For the Maryland Consolidated Theft Statute, see MD. ANN. CODE art. 27, §§ 340-345 (1996).

29. *Worthington v. State*, 58 Md. 403, 409 (1882); see *Murray v. State*, 214 Md. 383, 386, 135 A.2d 314, 315 (1957) (quoting *Worthington* for the common law definition of larceny); *Canton Nat’l Bank v. American Bonding & Trust Co.*, 111 Md. 41, 44-45, 73 A. 684, 685 (1909) (stating and comparing the varying definitions of larceny employed by seventeenth and eighteenth century English treatises).

A number of more recent cases define larceny as the “fraudulent taking and carrying away of a thing without claim of right with the intention of converting it to a use other than that of the owner without his consent.” See, e.g., *State v. Gover*, 267 Md. 602, 606, 298 A.2d 378, 381 (1973) (emphasis omitted); *Brown v. State*, 236 Md. 505, 513, 204 A.2d 532, 536 (1964); *Putinski v. State*, 223 Md. 1, 3, 161 A.2d 117, 119 (1960).

taking and asportation"³⁰ of goods from the actual or constructive possession of the owner.³¹

English law classified larceny as either grand or petit; both were felonies, but the latter carried a less severe penalty.³² While no Maryland statute distinguishes between grand and petit larceny, the Maryland Consolidated Theft Statute distinguishes between felonious and nonfelonious larceny.³³ According to Section 342(f) of Article 27, stealing property or services that have a value of \$300 or more constitutes a felony, and stealing property or services that have a value of less than \$300 constitutes a misdemeanor.³⁴ The punishment imposed—the length of incarceration and/or the amount of the fine—is affected by the classification of the crime as either a felony or a misdemeanor.³⁵

b. The History of the Single Larceny Doctrine.—

(1) *At English Common Law.*—The single larceny doctrine—the principle that the taking of several articles of property belonging

30. *Brown*, 236 Md. at 513, 204 A.2d at 536; *accord* *Loker v. State*, 250 Md. 677, 686-87, 245 A.2d 814, 819 (1968) (agreeing that taking and asportation are two elements necessary to constitute a larceny); *cf.* *Wiggins v. State*, 8 Md. App. 598, 603, 261 A.2d 503, 506 (1970) ("The slightest asportation is sufficient. The trespasser must acquire complete control over the property, but the slightest entire removal of it from the place it occupies, and a temporary control of it, even for a moment is enough." (quotation omitted)).

31. *See* *Farlow v. State*, 9 Md. App. 515, 517, 265 A.2d 578, 580 (1970) ("The 'taking' refers to the taking of possession from possession of one entitled thereto.").

32. *See* *Melia v. State*, 5 Md. App. 354, 360 n.5, 247 A.2d 554, 558 n.5 (1968) ("[At common law,] the punishment for grand larceny was death and forfeiture of goods, subject to benefit of clergy. The punishment for petit larceny was forfeiture of goods and whipping, or some corporal punishment less than death.").

33. *See* MD. ANN. CODE art. 27, § 342(f) (1996).

34. *Id.*

35. The statute provides in pertinent part:

(f) Penalty

(1) A person convicted of theft where the property or services that was the subject of the theft has a value of \$300 or greater is guilty of a felony and shall restore the property taken to the owner or pay him the value of the property or services, and be fined not more than \$1,000, or be imprisoned for not more than 15 years, or be both fined and imprisoned in the discretion of the court.

(2) A person convicted of theft where the property or services that was the subject of the theft has a value of less than \$300 is guilty of a misdemeanor and shall restore the property taken to the owner or pay him the value of the property or services, and be fined not more than \$500, or be imprisoned for not more than 18 months, or be both fined and imprisoned in the discretion of the court; however, all actions or prosecutions for theft where the property or services that was the subject of the theft has a value of less than \$300 shall be commenced within 2 years after the commission of the offense.

Id.

to different individuals at the same time constitutes one crime—has existed for a long time. In a classic English case, *Regina v. Giddins*,³⁶ a prisoner was charged with assaulting two individuals at the same time and then stealing from them.³⁷ The prisoner stole two shillings from one individual, one shilling and a hat from the other.³⁸ The court held: "It is all one act and one entire transaction: [both individuals] were assaulted and robbed at one and the same time; and there was no interval of time between the assaulting and robbing of the one and the assaulting and robbing of the other."³⁹

Seventeenth and eighteenth century English writers also considered the single larceny doctrine in the context of aggregating several petty larcenies into a single grand larceny.⁴⁰ Sir Matthew Hale distinguished between the defendant who steals a total of twenty pence from three separate owners at different times, and the defendant who steals a total of eighteen pence from three separate owners at the same time.⁴¹ Whereas the first defendant engaged in several petit larcenies, the second defendant engaged in one grand larceny because "it was one entire felony done at the same time."⁴²

(2) *Case Law in Maryland*.—The Court of Appeals first addressed the single larceny doctrine in the 1893 case, *State v. Warren*.⁴³ In *Warren*, the defendant was charged with stealing several sums of money belonging to different owners at the same time;⁴⁴ the defendant's indictment contained two counts. The trial court dismissed the counts as duplicative.⁴⁵ On appeal, the court considered the follow-

36. *Regina v. Giddins*, 174 Eng. Rep. 667 (Worcester Assizes (Crown Side) 1842) (holding that the stealing of several objects from different people at the same time and same place did not constitute distinct crimes).

37. *Id.*

38. *Id.*

39. *Id.*

40. See 1 SIR MATTHEW HALE, *THE HISTORY OF THE PLEAS OF THE CROWN* 531 (1st Amer. Ed. 1847) (distinguishing between stealing several goods from several people at *different* times and stealing several goods from several people at the *same* time); 2 EDWARD HYDE EAST, *A TREATISE OF THE PLEAS OF THE CROWN* 740-41 (Professional Books Ltd. 1987) (1806) ("[I]f the property of several persons, lying together in one bundle or chest, or even in one house, be stolen together at one time . . . the value of all may be put together so as to make it grand larceny . . . for it is one felony.").

41. See 1 HALE, *supra* note 40, at 531. Petty larceny was defined as the theft of articles valued at less than 12 pence. See also *Melia v. State*, 5 Md. App. 354, 361 n.5, 247 A.2d 554, 558 n.5 (1968) (noting that theft of property having a value greater than 12 pence was classified as grand larceny).

42. 1 HALE, *supra* note 40, at 531.

43. 77 Md. 121, 26 A. 500 (1893).

44. *Id.*

45. *Id.* at 122, 26 A. at 500.

ing question: "Does the stealing of several articles of property at the same time, belonging to several owners, constitute one offense, or as many separate offenses as these different owners of the property stolen?"⁴⁶

The *Warren* court concluded that the stealing of several articles at the same time, belonging either to one or to several persons, is one offense because "the act is one continuous act—the same transaction."⁴⁷ The court reasoned that the essence of the offense is the felonious taking of the property, not the fact that property is stolen from several different individuals.⁴⁸ The court explained that the purpose of identifying property ownership is merely to inform a defendant about the precise nature of the charges against him.⁴⁹ Furthermore, the court stated that because larceny is "an offense against the public,"⁵⁰ it is prosecuted "in the name of the state," in order to protect the public, and not on behalf of the victimized property owners.⁵¹

Since *Warren*, the Court of Appeals has not addressed whether taking property from different owners at the same time is one crime or several crimes. It has, however, reviewed related issues. In *Horsey v. State*,⁵² the Court of Appeals considered a larceny conviction for a defendant who stole several boxes of merchandise from the same store owner on two separate occasions, approximately two months apart.⁵³ The defendant argued that the State should not be able to aggregate the value of merchandise taken on the two separate occasions because each constituted a separate crime.⁵⁴ Rejecting this argument, the court held that the thefts constituted a single crime because "the separate takings were pursuant to a common scheme or intent."⁵⁵ The court explained that "the fact that the takings occur[red] on different occasions does not establish that they are separate crimes."⁵⁶

46. *Id.*

47. *Id.*

48. *Id.*

49. *Id.*

50. *Id.*

51. *Id.*

52. 225 Md. 80, 169 A.2d 457 (1961) (per curiam).

53. *Id.* at 82, 169 A.2d at 459. See generally Peter G. Guthrie, Annotation, *Series of Takings Over a Period of Time as Involving Single or Separate Larcenies*, 53 A.L.R. 3d 398, 400 (1974) (discussing "whether a series of takings from the same owner over a period of time constitutes a single larceny or a number of separate larcenies").

54. *Horsey*, 225 Md. at 83, 169 A.2d at 459.

55. *Id.*

56. *Id.*

The Court of Appeals considered another related issue in *Bane v. State*.⁵⁷ In *Bane*, the court reviewed a conviction where the defendant was charged, among other things, with two separate counts of storehouse breaking from a single building.⁵⁸ The premises were occupied by two different businesses, separated only by a hallway; there were no signs, either inside or outside, that indicated that the offices were separate.⁵⁹ The *Bane* court concluded that the separate counts could not stand and that there could be only one conviction because there was only one objectively identifiable storehouse.⁶⁰

Although the Court of Appeals has not formally addressed the single larceny doctrine since *Warren*, the Court of Special Appeals has done so. In *Govostis v. State*,⁶¹ the Court of Special Appeals merged the defendant's two theft convictions for taking two different articles of property from the same person at the same time.⁶² After committing a murder, the defendant and his accomplice stole the victim's car and the victim's other belongings.⁶³ The defendant later argued that the convictions had to be merged because the takings were part of a "single, continuous course of conduct."⁶⁴ Citing the "one transaction" language of *Warren*, and the "common scheme or intent" language of *Horsey*, the court found that there was but one theft.⁶⁵ The court explained that "[s]tealing the victim's personal effects as well as his car were not separately conceived crimes; there was but one criminal scheme and one criminal intent, thus one theft."⁶⁶ The court merged the theft sentences.⁶⁷

(3) *Case Law In Other Jurisdictions*.—Despite the relative scarcity of case law in Maryland, there is extensive case law on the single larceny doctrine in other jurisdictions.⁶⁸ At one time, several jurisdic-

57. 327 Md. 305, 609 A.2d 313 (1992).

58. *Id.* at 307, 609 A.2d at 314.

59. *Id.*

60. *Id.* at 317, 609 A.2d at 318-19. The *Bane* court also noted that, although the Court of Appeals had not directly adopted the single larceny doctrine, the Court of Special Appeals had. *Id.* at 311 n.4, 609 A.2d at 316 n.4. While recognizing that the majority of jurisdictions had adopted the single larceny doctrine, the court did not address the doctrine because it did not affect the outcome in this case. *Id.*

61. 74 Md. App. 457, 538 A.2d 338 (1988).

62. *Id.* at 470-71, 538 A.2d at 344-45.

63. *Id.* at 461, 470, 538 A.2d at 340, 344.

64. *Id.* at 471, 538 A.2d at 344.

65. *Id.*, 538 A.2d at 345.

66. *Id.*

67. *Id.*

68. See White, *supra* note 3, at 1407 (discussing the history and application of the single larceny doctrine and comparing the approaches of different jurisdictions to this doctrine).

tions followed the separate larceny doctrine "under which there was a distinct larceny as to the property of each person."⁶⁹ Other jurisdictions took the position that the state could elect to prosecute such situations as either one offense or several distinct offenses.⁷⁰ Only one jurisdiction still takes this position.⁷¹ Today, the overwhelming majority of jurisdictions follow the single larceny doctrine.⁷²

69. *Id.* at 1410; see *United States v. Beerman*, 24 F. Cas. 1065, 1075 (C.C.D.D.C. 1838) (No. 14,560) (asserting that "the stealing of the goods of divers persons at the same time, constitutes as many distinct felonies"); *Commonwealth v. Hoffman*, 121 Mass. 369, 370 (1876) (stating that an acquittal for the breaking and entering of "a dwelling-house and stealing therein the property of [owner 1], was no bar to this complaint for stealing in the same dwelling-house at the same time the property of [owner 2]"); *Phillips v. State*, 3 S.W. 434, 435 (Tenn. 1887) (upholding the trial judge's instruction that if mother and daughter "were the owners of different lots of goods in the same room, and they were feloniously taken and carried away, although it was done on the same evening, and during one continuing trespass, it would be two separate and distinct larcenies"); *Morton v. State*, 69 Tenn. 498, 499 (1878) (stating that an indictment alleging the theft of items belonging to two different owners "avers two separate and distinct offenses").

70. See *Commonwealth v. Sullivan*, 104 Mass. 552, 553 (1870) ("The stealing at the same time and by one taking of several articles belonging to different persons is larceny of the whole and of each article; and may be indicted either in one aspect or the other—as one entire crime, or as several distinct offences."); *State v. Lambert*, 9 Nev. 321, 324 (1874) ("[T]he stealing of the property of different persons at the same time and place and by the same act may be prosecuted at the pleasure of the government as one offense or as several distinct offenses."); *Long v. State*, 43 Tex. 467, 470-71 (1875) ("[T]he State is not bound to divide the single act [of driving several cattle belonging to different owners from a range] into all the separate charges which might be formed out of it, but may charge the taking . . . as one offense."); *Haywood v. Territory*, 2 P. 189, 190 (Wash. 1883) (explaining that "while it is true that the taking of two horses, the property of different persons, might constitute two separate offenses, . . . if they were taken at the same time, the prosecutor could elect to treat it as one transaction, and charge it as a single offense"). See generally *White*, *supra* note 3, at 1410 n.11 (stating that jurisdictions which permitted such an election included the District of Columbia, Massachusetts, Nevada, Texas, and Washington).

71. Nevada is the one jurisdiction that maintains this position. See *State v. Douglas*, 65 P. 802 (Nev. 1901); *Lambert*, 9 Nev. at 324; *White*, *supra* note 3, at 1410 n.11.

72. See *State v. Stoops*, 603 P.2d 221, 226 (Kan. Ct. App. 1979) ("Out of the thirty-five states that have considered the question [as of 1979], thirty-four appear to have adopted the single larceny theory."); Todd R. Smyth, *Articles Belonging to Different Owners*, 50 AM. JUR. 2d *Larceny* § 7 (1995) (listing cases from various jurisdictions that follow the single larceny doctrine); *White*, *supra* note 3, at 1410-14 (providing a thorough compilation of jurisdictions that have adopted the single larceny doctrine).

Many jurisdictions formally adopted the single larceny doctrine in the late 1800s and early 1900s. See, e.g., *Sweek v. People*, 277 P. 1, 3 (Colo. 1929); *Lowe v. State*, 57 Ga. 171, 172 (1876); *Furnace v. State*, 54 N.E. 441, 442 (Ind. 1899); *State v. Sampson*, 138 N.W. 473, 475 (Iowa 1912); *Bushman v. Commonwealth*, 138 Mass. 507, 508 (1885); *Ward v. State*, 43 So. 466, 467 (Miss. 1907); *State v. Toombs*, 34 S.W.2d 61, 66 (Mo. 1930); *State v. Mjelde*, 75 P. 87, 88 (Mont. 1904); *State v. Merrill*, 44 N.H. 624, 625 (1863); *State v. Klasner*, 145 P. 679, 680 (N.M. 1914); *State v. Douglas*, 65 P. 802, 803 (Nev. 1901); *State v. Hennessey*, 23 Ohio St. 339, 345 (1872); *Woolbright v. State*, 288 P. 499, 500 (Okla. Crim. App. 1930); *Fulmer v. Commonwealth*, 97 Pa. 503, 507 (1881); *State v. Kieffer*, 95 N.W. 289, 290-91 (S.D. 1903); *Ratcliff v. State*, 38 S.W.2d 326, 327 (Tex. Crim. App. 1931); *State v. McKee*, 53 P. 733, 734 (Utah 1898); *State v. Newton*, 42 Vt. 537, 537 (1870); *Alexander v. Common-*

In the federal arena, several circuits have also considered and approved the single larceny doctrine.⁷³ The Eleventh Circuit decision in *United States v. Perez*⁷⁴ is characteristic of that approval. In *Perez*, the defendants stole several items from the Miccosukee Tribal Cultural Center gift shop, including jewelry and a money bag from the shop, and the purse of the gift shop manager.⁷⁵ A grand jury indicted the defendants on three counts, and a jury found the defendants guilty on the first two counts.⁷⁶ On appeal, the defendants argued that the district lacked subject matter jurisdiction over the second count of the indictment, which charged the defendants with theft under Florida law and the Assimilative Crimes Act (ACA) of the items stolen from the Cultural Center and the shop manager.⁷⁷ The defendants contended that they could have been indicted under the federal Embezzlement and Theft from Indian Tribal Organization Statute;⁷⁸ this would have precluded application of Florida law via the ACA. However, because the theft from the store manager did not fall within that federal statute,⁷⁹ Florida law was applied through the ACA. In re-

wealth, 20 S.E. 782, 783 (Va. 1894); *State v. Makovsky*, 120 P. 513, 514 (Wash. 1912); *Ackerman v. State*, 54 P. 228, 230 (Wyo. 1898).

Several jurisdictions have formally adopted the single larceny doctrine more recently. See, e.g., *People v. Bauer*, 461 P.2d 637, 643 (Cal. 1969) (in bank); *People v. Fuentes*, 527 N.E.2d 152, 155 (Ill. App. Ct. 1988); *Fair v. Commonwealth*, 652 S.W.2d 864, 866-67 (Ky. 1983); *State v. Myers*, 407 A.2d 307, 309 (Me. 1979); *People v. Williams*, 296 N.W.2d 293, 295 (Mich. Ct. App. 1980); *People v. Caron*, 121 N.Y.S.2d 404, 409 (Crim. Ct. 1953); *State v. Jager*, 85 N.W.2d 240, 243 (N.D. 1957); *State v. McDonald*, 365 P.2d 494, 497 (Or. 1961) (in banc); *Seamster v. State*, 283 S.W.2d 243, 244 (Tex. Crim. App. 1955).

73. The Fifth, Tenth, and Eleventh Circuits have addressed the single larceny doctrine, by applying it both to larceny and to other theft crimes. See *Mansfield v. Champion*, 992 F.2d 1098, 1102 (10th Cir. 1993) ("We see no logical reason why the single larceny rule is not applicable to the larceny element of robbery, as other courts have held."); *United States v. Billingslea*, 603 F.2d 515, 520 n.6 (5th Cir. 1979) ("We note with approval the position adopted by a number of state courts that a series of larcenies may be properly charged in a single larceny where there was a continuing impulse, intent, plan, or scheme actuating the several takings." (internal quotation marks omitted)); *infra* note 74.

74. 956 F.2d 1098 (11th Cir. 1992) (per curiam).

75. *Id.* at 1100. The Center "is located on the Miccosukee Indian Reservation [in Florida] and belongs to the Miccosukee Tribe of Indians." *Id.* at 1099.

76. *Id.* at 1100.

77. *Id.* The Assimilative Crimes Act (ACA), 18 U.S.C. § 13 (1969 & Supp. 1998), states that:

Whoever within [a special territorial jurisdiction of the United States] is guilty of any act or omission which, although not made punishable by any enactment of Congress, would be punishable if committed or omitted within the jurisdiction of the State . . . in which such place is situated, by the laws thereof in force at the time of such act or omission, shall be guilty of a like offense and subject to a like punishment.

78. 18 U.S.C. § 1163 (1984 & Supp. 1998).

79. *Perez*, 956 F.2d at 1102.

sponse to the defendants' argument that the theft from the gift shop and the theft from the shop manager should not have been combined into one count,⁸⁰ the Eleventh Circuit noted that "[t]his circuit has approved the 'single larceny doctrine.'"⁸¹ The court concluded that "[b]ecause the thefts from the tribe and [the shop manager] were clearly part of a single scheme, they were properly combined in count II."⁸²

The Seventh Circuit represents a different position, "a decidedly minority view."⁸³ Without specifically addressing the single larceny doctrine, the Seventh Circuit seemed to disapprove of the principle. *United States v. Marzano*⁸⁴ involved the "theft of more than three million dollars from the vaults of Purolator Security, Inc."⁸⁵ Among other things, the defendant was charged with six counts of stealing money, belonging to several different banks, from the possession of Purolator.⁸⁶ The Seventh Circuit considered whether, in light of the fact that all the money was stolen from Purolator, the trial court erred in charging multiple counts. This determination turned on whether Congress intended the unit of prosecution⁸⁷ to be the victim or the act.⁸⁸ The court explained that "[a] single occurrence may constitute

80. *Id.*

81. *Id.*

82. *Id.*

83. *White*, 348 Md. at 192, 702 A.2d at 1269.

84. 537 F.2d 257 (7th Cir. 1976). In response to the State's citation of *Marzano* in its Brief, the Court of Appeals discussed the case in *White*, 348 Md. at 191-92, 702 A.2d at 1269. The State used *Marzano* to argue that the single larceny doctrine "is most applicable where the property taken is fungible and commingled such that it is not possible to determine ownership." Brief of Petitioner at 8, *State v. White*, 348 Md. 179, 702 A.2d 1263 (1997) (No. 13). The court rejected the State's argument. *White*, 348 Md. at 191-92, 702 A.2d at 1269; see *infra* notes 107-112 and accompanying text (discussing the court's conclusion that *Marzano* is not applicable to *White*'s case).

85. *Marzano*, 537 F.2d at 261. Purolator was responsible for transporting cash between banks and business establishments.

86. *Id.* *Marzano* was charged with violating the Bank Robbery and Incidental Crimes Statute. 18 U.S.C. § 2113(b) (1984 & Supp. 1998). "A separate count was charged for each bank whose money was taken." *Marzano*, 537 F.2d at 272.

87. The 'unit of prosecution' refers to the behavior that is criminalized. See *Brown v. State*, 311 Md. 426, 434, 535 A.2d 485, 489 (1988) ("The unit of prosecution of a statutory offense is generally a question of what the legislature intended to be the act or course of conduct prohibited by the statute for purposes of a single conviction and sentence."); *Burroughs v. State*, 88 Md. App. 229, 246, 594 A.2d 625, 633 (1991) ("In homicide cases, the units of prosecution are dead bodies . . ."); *Cunningham v. State*, 78 Md. App. 254, 263, 552 A.2d 1335, 1340 (1989) (holding that the unit of prosecution for the charge of "possession of a controlled dangerous substance" is the type of substance possessed, not the act of possessing).

88. See *Marzano*, 537 F.2d at 272-73.

multiple offenses if Congress so intends.”⁸⁹ The court concluded that a separate crime could be charged for each bank; the fact that the money was taken only from the single source of Purolator was irrelevant.⁹⁰ Because the money was kept in separate containers, and was not commingled, it was clear that the money belonged to different owners.⁹¹

3. *The Court's Reasoning.*—In *State v. White*,⁹² the Court of Appeals held that the single larceny doctrine exists in Maryland law, that it remains after the passage of the Consolidated Theft Statute, and that it applied in *White*.⁹³ Thus, the stealing of several articles of property, whether belonging to one owner or several owners, constitutes one offense.⁹⁴

After briefly recognizing the rationales underlying the single larceny doctrine,⁹⁵ the court examined case law relating to the single larceny doctrine.⁹⁶ Tracing the doctrine back to common law, the court cited English scholars.⁹⁷ The court then discussed the few relevant Maryland cases and provided an overview of the doctrine's treatment in other jurisdictions.⁹⁸

Following its survey of case law, the court explained its reasons for adopting the single larceny doctrine. First, the court stated, contrary to the State's assertion, that the single larceny doctrine was applicable to *White's* situation. Citing an Oregon case, *State v. Gilbert*,⁹⁹ the State had contended that the individual crime victim should be the determining factor in imposing punishments; in other words, the owner should be used as the unit of prosecution.¹⁰⁰ Under the State's reasoning, *White* would have been found guilty of two separate counts of theft. While recognizing the similarities between Oregon and Maryland theft law,¹⁰¹ the court explained that the Oregon decision

89. *Id.* at 272 (citing *Ebeling v. Morgan*, 237 U.S. 625 (1915); *Barringer v. United States*, 399 F.2d 557 (D.C. Cir. 1968)).

90. *Id.* at 273.

91. *Id.*

92. 348 Md. 179, 702 A.2d 1263 (1997).

93. *Id.* at 196, 702 A.2d at 1271.

94. *Id.* at 181, 702 A.2d at 1263-64.

95. *Id.* at 183, 702 A.2d at 1265.

96. *Id.* at 184-90, 702 A.2d at 1265-68.

97. *Id.* at 183-84, 702 A.2d at 1265; see *supra* notes 40-42 and accompanying text.

98. *White*, 348 Md. at 184-90, 702 A.2d at 1265-68; see *supra* notes 43-66 and accompanying text.

99. 574 P.2d 313 (Or. 1978) (in banc).

100. *White*, 348 Md. at 190, 702 A.2d at 1268; see also *supra* note 87 and accompanying text (discussing the “unit of prosecution” concept).

101. *White*, 348 Md. at 190, 702 A.2d at 1268.

was based on that state's Former Jeopardy statute.¹⁰² That statute provides that, when the same criminal conduct violates only one statutory provision, but results in loss to two or more victims, "there are as many offenses as there are victims."¹⁰³ Thus, in *Gilbert*, because the defendant's receipt of stolen guns "result[ed] in a loss to six different persons,"¹⁰⁴ the Oregon court found that there were six separate offenses.¹⁰⁵ Because "there is no counterpart in Maryland" to the Oregon statute, the *White* court declined to apply *Gilbert's* reasoning to the case before it.¹⁰⁶

Second, the *White* court, again rejecting one of the State's contentions, concluded that the single larceny doctrine did not have limited applicability.¹⁰⁷ In its brief, the State had relied upon *United States v. Marzano*,¹⁰⁸ which upheld a defendant's multicount conviction for stealing money belonging to several banks from a single location at the same time,¹⁰⁹ to argue that the single larceny doctrine "'is most applicable where the property taken is fungible and commingled such that it is not possible to determine ownership.'"¹¹⁰ The court rejected this argument because it disagreed with the State's reading of *Marzano*.¹¹¹ The court noted that the *Marzano* court's only explanation for considering the thefts as a multicount offense was that the money was stored in separate containers. Presumably the separate containers put the *Marzano* defendant on notice that he was stealing from separate owners. However, the *White* court concluded that the above explanation was inadequate; there was "nothing in the [*Marzano*] opinion to suggest that the court viewed the single larceny doctrine as limited to cases of commingled or fungible property."¹¹²

Third, rejecting the State's contention to the contrary, the court held that the Maryland theft statute did not preclude application of

102. See OR. REV. STAT. § 131.505(3) (1973 & Supp. 1998) ("When the same conduct or criminal episode, though violating only one statutory provision, results in death, injury, loss or other consequences of two or more victims, and the result is an element of the offense defined, there are as many offenses as there are victims.").

103. *Id.*

104. *Gilbert*, 574 P.2d at 317.

105. *Id.* at 318.

106. *White*, 348 Md. at 190, 702 A.2d at 1268.

107. *Id.*

108. 537 F.2d 257 (7th Cir. 1976); see also *supra* notes 84-91 and accompanying text.

109. *Marzano*, 537 F.2d at 272-73, 276.

110. *White*, 348 Md. at 191, 702 A.2d at 1268-69 (quoting Brief of Petitioner at 8, *White* (No. 13)).

111. *Id.*, 702 A.2d at 1269.

112. *Id.* The *White* court also noted that, to the extent that *Marzano* does reject the single larceny doctrine, it "also represents a decidedly minority view." *Id.*

the single larceny doctrine.¹¹³ The State used two text-based arguments to explain why the Maryland Consolidated Theft Statute abrogated the single larceny doctrine. The State first argued that, by using the singular form of “owner” in Article 27, section 342(a),¹¹⁴ “the Legislature intended for there to be ‘no impediment to separately charging, proving, and punishing thefts of items belonging to different owners.’”¹¹⁵ Second, the State argued that by including a provision¹¹⁶ which permits aggregation of the value of stolen items when there is “one scheme or continuing course of conduct,”¹¹⁷ the legislature intended that the single larceny doctrine be applicable in this specific context.¹¹⁸ By inference, then, the single larceny doctrine would not be applicable in all other contexts. Thus, in all situations where the aggregation provision does not apply (such as White’s case), “each taking would be subject to separate prosecution and punishment.”¹¹⁹

Rejecting the first argument, the court explained that the term “owner” in the statute was used to indicate property ownership and “not [used] to define the unit of prosecution.”¹²⁰ With respect to the second argument, the court decided that the aggregation provision was inserted for a purpose other than that suggested by the State. Using the legislative history of the statute, the court concluded that the legislature inserted the provision to convey the notion “that a person who steals property *at different times* from several persons and places as part of a continuing scheme has engaged in activity which is just as reprehensible as a person who steals an equal amount from a single person and place at one time.”¹²¹ Thus the aggregation provision was

113. *Id.* at 192, 702 A.2d at 1269.

114. This section provides: “*Obtaining or exerting unauthorized control.*—A person commits the offense of theft when he willfully or knowingly obtains control which is unauthorized or exerts control which is unauthorized over property of the *owner*” MD. ANN. CODE art. 27, § 342(a) (1996) (second emphasis added).

115. *White*, 348 Md. at 193, 702 A.2d at 1270 (quoting Brief of Petitioner at 9, *White* (No. 13)).

116. In a section defining the value of stolen goods, the theft statute provides:

When theft is committed in violation of this subheading pursuant to one scheme or continuing course of conduct, whether from the same or several sources, the conduct may be considered as one offense and the value of the property or services aggregated in determining whether the theft is a felony or a misdemeanor.

MD. ANN. CODE art. 27, § 340(n)(5) (1996).

117. *White*, 348 Md. at 194, 702 A.2d at 1270 (quoting MD. ANN. CODE art. 27, § 340(n)(5)).

118. *Id.*

119. *Id.*

120. *Id.* at 193, 702 A.2d at 1270 (citing JOINT COMMITTEE ON THEFT RELATED OFFENSES, REVISION OF MARYLAND THEFT LAWS AND BAD CHECK LAWS 19 (1978)).

121. *Id.* at 195, 702 A.2d at 1271.

not meant to deal with situations where several articles of property were taken from several people at the same time.¹²² Instead, this provision was meant to deal with situations where, as part of a continuing scheme, "property is taken *at different times* from several persons and places."¹²³

Fourth, the court examined the legislative history, particularly the purpose of the enactment of the Consolidated Theft Statute, and concluded that there was "nothing in the legislative history" to suggest that the General Assembly intended "to abrogate the single larceny doctrine."¹²⁴ The court noted that the Consolidated Theft Statute was intended "'to eliminate the[] technical and absurd distinctions that have plagued the larceny related offenses and produced a plethora of special provisions in the criminal law.'"¹²⁵ The court further explained that the Consolidated Theft Statute was intended to consolidate disparate common law rules, not to effect a "tacit change in the substance of the law."¹²⁶

4. *Analysis.*—In *State v. White*, the Court of Appeals held that the stealing of several articles of property, whether belonging to one owner or several owners, constitutes one offense and not separate offenses.¹²⁷ In so doing, the court affirmed the Court of Special Appeals, which had overruled the trial court's decision that the defendant should be convicted and sentenced separately for stealing,

122. *Id.* at 194-95, 702 A.2d at 1270-71 (citing JOINT COMMITTEE ON THEFT RELATED OFFENSES, *supra* note 120, at 27). Concerning the purpose of section 340(n)(5), this report states:

Paragraph (5) of this subsection allows aggregation of the value of stolen property or services in order to determine whether theft is a felony or a misdemeanor. In this manner, the total value of the property or services which are stolen in any one scheme or continuing course of conduct may be considered to decide if the cumulative amount taken warrants a misdemeanor or felony penalty. Although the value of the property may be aggregated for the purpose of determining the potential penalty, the prosecution must still allege and prove each separate incident that is part of the aggregated offense.

The paragraph on aggregation was inserted on the basis that a person who steals property *at different times* from several persons and places as part of a continuing scheme has engaged in activity which is just as reprehensible as a person who steals an equal amount from a single person and place at one time.

JOINT COMMITTEE ON THEFT RELATED OFFENSES, *supra* note 120, at 27 (emphasis added).

123. *White*, 348 Md. at 195, 702 A.2d at 1271.

124. *Id.*

125. *Id.* at 196, 702 A.2d at 1271 (quoting JOINT COMMITTEE ON THEFT RELATED OFFENSES, *supra* note 120, at 2).

126. *Id.*

127. *Id.* at 180-81, 702 A.2d at 1263-64.

at the same time, items belonging to two different owners.¹²⁸ As a result, the defendant in *White* could only be convicted of one theft crime.

The court's decision formally to adopt the single larceny doctrine is wise for several reasons. First, the decision clarifies Maryland law on this matter. Second, it is consistent with past case law and the Consolidated Theft Statute. The court followed the 104-year-old precedent established in *State v. Warren*, and engaged in a proper reading of the Consolidated Theft Statute. Third, the decision is consistent with the trend of most jurisdictions in the United States.¹²⁹

a. The Court's Decision Clarifies Maryland Law.—Prior to *White*, only the Court of Special Appeals, and not the Court of Appeals, had formally adopted the single larceny doctrine. In *Govostis v. State*,¹³⁰ the Court of Special Appeals held that the stealing of several articles at one time, belonging to either one owner or many owners, constitutes one offense.¹³¹ Thus, with the formal adoption of the single larceny doctrine by the Court of Appeals, the law of the state has been firmly established. As such, Maryland theft law has been clarified.

b. The Court's Decision is Consistent With Precedent.—In addition to clarifying Maryland theft law, the court's decision in *White* is consistent with precedent. While Maryland case law on the single larceny doctrine is scarce, *State v. Warren*¹³² did address the principles that underlie this doctrine.¹³³ The *Warren* court provided the oft-quoted reasoning that the taking of several items from multiple owners at the same time is "one continuous act" and the "same transaction."¹³⁴ Furthermore, the *Warren* court concluded that "it seems clear to us, on principle, that the taking of several articles of property under such circumstances constitutes but one felony."¹³⁵ Based not only on the reasoning provided by the *Warren* court, but also on the *White* court's conclusion stated above, it seems clear that, in *White*, the Court of Appeals was "set[ting] forth the generally accepted theoretic-

128. *Id.* at 182, 702 A.2d at 1264.

129. See *supra* note 72 and accompanying text.

130. 74 Md. App. 457, 538 A.2d 338 (1988).

131. *Id.* at 471, 538 A.2d at 344-45.

132. 77 Md. 121, 26 A. 500 (1893).

133. See *id.* at 122-23, 26 A. at 500 (noting that, because the purpose of theft law is to protect the public rather than vindicate individual victims, the taking of several items from multiple owners at the same time constitutes a continuous act that is but one offense).

134. *Id.* at 122, 26 A. at 500.

135. *Id.* at 122-23, 26 A. at 500.

cal basis of the single larceny doctrine that the taking is but one offense because the act is one continuous act."¹³⁶

The *Warren* court not only laid the groundwork for adopting the single larceny doctrine, but also made explicit the unit of prosecution in common law larceny. The *Warren* court stated that "the gist of the offense [is] the felonious taking,"¹³⁷ and that "[the court does] not see how the legal quality of the act is in any manner affected by the fact that the property stolen . . . is the several property of different persons."¹³⁸ From this analysis, it follows that the unit of prosecution for common law larceny was the "felonious taking," i.e., the act of stealing.¹³⁹

Subsequent Maryland cases upheld this conclusion. In *Horsey*, the Court of Appeals held that "the fact that the takings occur[red] on different occasions does not establish that they are separate crimes,"¹⁴⁰ because they were part of a "common scheme or intent."¹⁴¹ In *Govostis*, the Court of Special Appeals merged theft convictions because, under *Horsey*, the actions were part of "a common scheme or a 'single criminal impulse.'"¹⁴² In both cases, the notion of a common scheme implicitly presupposes that the object of prosecution is the act of the taking, not the number of items stolen or the number of property owners. In *Bane*,¹⁴³ although the single larceny doctrine was not considered at the appellate level,¹⁴⁴ the court still acknowledged the doctrine in a footnote and cited *Warren* and *Govostis*.¹⁴⁵

The *White* decision accords with the above discussed line of cases. The court in *White* upheld the underlying logic of the *Warren* decision. The court also properly recognized that subsequent case law has implicitly supported the principles underlying the single larceny doc-

136. See *White*, *supra* note 3, at 1413.

137. *Warren*, 77 Md. at 122, 26 A. at 500.

138. *Id.*

139. See Respondent's Brief at 6, *State v. White*, 348 Md. 179, 702 A.2d 1263 (1997) (No. 13) ("Hence, under *Warren*, the unit of prosecution for common law larceny in Maryland was the act of stealing.").

140. *Horsey v. State*, 225 Md. 80, 83, 169 A.2d 457, 459 (1961) (per curiam).

141. *Id.*

142. *Govostis v. State*, 74 Md. App. 457, 471, 538 A.2d 338, 345 (1988) (quoting 52A C.J.S. *Larceny* § 53 (1968)).

143. *Bane v. State*, 327 Md. 305, 307-08, 609 A.2d 313, 314 (1992).

144. *Bane* was convicted of various counts of theft and store breaking. *Id.* at 307, 609 A.2d at 314. The theft convictions were merged into the storehouse breaking convictions. *Id.* at 308, 609 A.2d at 314. With the theft convictions removed, the court had no need to discuss the unit of prosecution for common law larceny.

145. *Id.* at 312 n.4, 609 A.2d at 316 n.4.

trine. Thus, a decision that affirms the single larceny doctrine in Maryland is a decision consistent with the precedent of the state.

c. *The Court Adopts a Proper Reading of the Maryland Consolidated Theft Statute.*—The Maryland General Assembly adopted the Consolidated Theft Statute in 1978.¹⁴⁶ While the single larceny doctrine was part of pre-1978 Maryland common law, the applicability of the doctrine was not entirely clear after the introduction of the statute in 1978.¹⁴⁷ The question of whether the Consolidated Theft Statute incorporated the single larceny doctrine remained unanswered until *White*.

Because of the potential impact of the Consolidated Theft Statute on the single larceny doctrine, much of the dispute in *White* centered on interpreting this statute.¹⁴⁸ The *White* court, in rejecting the State's arguments, accepted *White*'s interpretation of the statute.¹⁴⁹ The court was correct to do so because *White*'s arguments were more plausible than the State's.

The State made two arguments, based on the text in the Consolidated Theft Statute, for the preclusion of the single larceny doctrine.¹⁵⁰ The State's "owner" argument¹⁵¹ is based on the singular-

146. See MD. ANN. CODE art. 27, §§ 340-345 (1996).

147. See *supra* notes 113-126 and accompanying text (discussing the *White* court's treatment of this statute and its legislative history).

148. The portion of the Consolidated Theft Statute under which *White* was convicted provides that:

(a) *Obtaining or exerting unauthorized control.* — A person commits the offense of theft when he willfully or knowingly obtains control which is unauthorized or exerts control which is unauthorized over property of the owner, and:

(1) Has the purpose of depriving the owner of the property; or
(2) Willfully or knowingly uses, conceals, or abandons the property in such manner as to deprive the owner of the property; or
(3) Uses, conceals, or abandons the property knowing the use, concealment, or abandonment probably will deprive the owner of the property.

MD. ANN. CODE art. 27, § 342(a) (1996). For conflicting interpretations of the statute, see Brief of Petitioner at 8-11, *White* (No. 13) (arguing that a proper interpretation of the Maryland theft statute indicates that "there are as many thefts as there are victims" and thus the single larceny doctrine is abrogated); Respondent's Brief at 8-12, *White* (No. 13) (arguing that "[s]ince the gravamen of a sub-§(a) theft is obtaining or exerting control over another's property with larcenous intent, that act committed with that intent is the unit of prosecution" and providing reasons why the legislature selected "the number of criminal transactions as a basis for multiplying a theft's punishment").

149. *White*, 348 Md. at 193-94, 702 A.2d at 1270.

150. See *supra* notes 113-126 and accompanying text.

151. See Brief of Petitioner at 9, *White* (No. 13) (stating that because the statute refers to the "'property of the owner' in the singular . . . there is no impediment to separately charging, proving, and punishing thefts of items belonging to different owners").

plural status of the word. The State's "value" argument¹⁵² is based on an inference as to why the state included this provision. The court was correct to find both of the State's arguments untenable in light of the legislative history of the Consolidated Theft Statute.

The legislative intent is indicated by the report of the joint subcommittee;¹⁵³ this report notes that, over the centuries, an "unwieldy and in some cases unintelligible body of statutory and case law" had developed.¹⁵⁴ Beginning in 1979, "the Legislature combined a number of separate offenses, each involving some type of deprivation of one's property, into one statute."¹⁵⁵ The purpose of enacting the statute was "to eliminate [the] technical and absurd distinctions that have plagued the larceny related offenses and produced a plethora of special provisions in the criminal law."¹⁵⁶ In light of these factors, the *White* court was correct to conclude as follows: "The fact is that there is nothing in the legislative history of the Consolidated Theft Statute even to suggest, much less to document, an intent by the General Assembly to abrogate the single larceny doctrine."¹⁵⁷

d. The Court Fails to Discuss the Public Policy Reasons for Adopting the Single Larceny Doctrine.—There are additional reasons, related to the protection of constitutional rights and to basic notions of fairness, that favor adoption of the single larceny doctrine. While the

152. See *id.* at 9-10 (arguing that section 340(n)(5), providing for aggregation of the value of stolen items, was included solely because, while the thefts of items from different owners "stand separately," the General Assembly intended aggregation as a means to permit prosecution of separate crimes together as felonies).

153. See JOINT COMMITTEE ON THEFT RELATED OFFENSES, *supra* note 120.

154. *Id.* at 1.

155. *Craddock v. State*, 64 Md. App. 269, 277, 494 A.2d 971, 975 (1985).

156. JOINT COMMITTEE ON THEFT RELATED OFFENSES, *supra* note 120, at 2; see *Jones v. State*, 303 Md. 323, 328-29, 493 A.2d 1062, 1064-65 (1985) (discussing the statute's purpose as stated in the Joint Subcommittee Report). See generally *Farlow v. State*, 9 Md. App. 515, 516, 265 A.2d 578, 580 (1970) (explaining that due to the lack of an inclusive crime statute, convictions for people who "unlawfully appropriate the personal property of another" are not straight-forward or clear-cut, but instead depend on alleging subtle factual distinctions).

157. *White*, 348 Md. at 195, 702 A.2d at 1271. In his Brief, *White* provided a comprehensive sampling of courts that "have held that the jurisdiction's consolidated theft statute incorporated the single larceny rule." Respondent's Brief at 9 n.5, *White* (No. 13); see *Martin v. State*, 797 P.2d 1209, 1218 (Alaska Ct. App. 1990); *State v. Fillmore*, 927 P.2d 1303, 1308-09 (Ariz. Ct. App. 1996); *People v. Bauer*, 461 P.2d 637, 642-43 (Cal. 1969) (in banc); *Reader v. State*, 349 A.2d 745, 747-48 (Del. 1975); *Johnson v. State*, 490 So. 2d 182, 184 (Fla. Dist. Ct. App. 1986); *People v. Fuentes*, 527 N.E.2d 152, 154-55 (Ill. App. Ct. 1988); *State v. Myers*, 407 A.2d 307, 309 (Me. 1979); *Commonwealth v. Donovan*, 478 N.E.2d 727, 734-35 (Mass. 1985); *Horse v. State*, 747 S.W.2d 748, 752 (Mo. Ct. App. 1988) (en banc); *State v. Brown*, 830 P.2d 183, 184-86 (N.M. Ct. App. 1992); *State v. Hall*, 298 S.E.2d 246, 255-56 (W. Va. 1982).

court alludes to these reasons in its opinion,¹⁵⁸ it fails to discuss them fully. The court's argument would have been strengthened by a discussion of the two additional reasons for adopting the single larceny doctrine: avoiding unfair and unreasonable punishments, and protecting individuals from double jeopardy.¹⁵⁹

Regarding the first reason, if the court were to interpret the statute to mean that the property owner was the unit of prosecution, so that the single larceny doctrine did not apply, the resulting punishments could be unusually harsh.¹⁶⁰ If "each owner's property were of sufficient value for grand larceny . . . a holding that there is a distinct larceny as to each owner could result in extremely severe punishment."¹⁶¹ Likewise, the punishment could be severe where each article of property stolen was owned jointly.¹⁶² Furthermore, imposing a punishment for each and every taking when the takings occurred from several different people at the same time would be particularly excessive when compared to the punishment for takings totaling the same amount but from only one person.¹⁶³

158. As other rationales for the doctrine, the court mentions "'the harshness of the punishment which might result from a contrary holding'" and "'the unconstitutionality of [] double jeopardy.'" *White*, 348 Md. at 183, 702 A.2d at 1265 (quoting *White*, *supra* note 3, at 1409-10).

159. *Id.*

160. See Respondent's Brief at 17, *White* (No. 13) (explaining that "by stealing a \$50 TV from the teachers' office, [White's] prison exposure would be 18 months, but, by stealing a \$3 pen from the desk of each of the four teachers who shared the office, his exposure would be 6 years"); see also *People v. Bauer*, 461 P.2d 637, 643 (Cal. 1969) (in bank). In *Bauer*, the court stated that a defendant can only be punished once when he engages in several property crimes against several people in the same transaction. *Id.* If the rule were otherwise, a defendant who burglarized a house and stole items belonging to different family members could receive consecutive sentences for as many items as there were family members. *Id.* See generally *Swee* v. *People*, 227 P. 1, 3 (Colo. 1929) (stating that the single larceny doctrine is a "humane rule").

161. See *White*, *supra* note 3, at 1409; see also *Swee*, 227 P. at 3 ("If each article stolen were of a value sufficient to make the crime a felony, and a separate charge could be filed as to each, a defendant, if convicted, might be sentenced to the penitentiary for the rest of his life.").

162. See Respondent's Brief at 17-18, *White* (No. 13) ("If 20 office workers jointly possess 20 pens and keep them together in one receptacle, theft of the 20 pens could bring 20 convictions and 30 years of incarceration. Theft of a \$300 office refrigerator jointly and severally owned by the 20 office workers could result in 20 convictions and 300 years of incarceration.").

163. See *State v. Eggesht*, 41 Iowa 574, 579 (1875) (noting the inconsistency between a defendant who hands a merchant one counterfeit bill equaling \$20 and is sent to the penitentiary for ten years for one crime, and the defendant who hands a merchant four counterfeit bills, each equaling \$5, and is sent to the penitentiary for forty years for four crimes); see also *State v. Sampson*, 138 N.W. 473, 474-75 (Iowa 1912) (restating the logic and examples provided in *Eggesht*).

The single larceny doctrine also protects an individual from double jeopardy. The Double Jeopardy Clause of the Fifth Amendment states that "nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb."¹⁶⁴ Double jeopardy issues arise where the "prosecution for stealing the property of one person is a bar to a prosecution for the larceny of the property of the other owners."¹⁶⁵ Although there are varying opinions, "the most common conclusion is that once the defendant has been tried, and either convicted or acquitted, or at least placed in jeopardy, for the larceny of the property of one owner, the state is barred from any further prosecutions for the larceny of the balance of the property."¹⁶⁶ Adoption of the single larceny doctrine avoids this danger. If all offenses are merged into one, regardless of the number of owners, then the possibility that the defendant is placed twice in jeopardy for the same offense will not arise.

5. *Conclusion.*—In *State v. White*, the Court of Appeals formally adopted the single larceny doctrine.¹⁶⁷ This decision clarifies Maryland theft law by strengthening the Court of Special Appeals's decision that previously recognized the single larceny doctrine.¹⁶⁸ *White* is

164. U.S. CONST. amend. V. For a discussion of double jeopardy, see *Benton v. Maryland*, 395 U.S. 784, 794 (1969) (holding "that the double jeopardy prohibition of the Fifth Amendment . . . should apply to the States through the Fourteenth Amendment"); *Blockburger v. United States*, 284 U.S. 299, 304 (1932) (providing a test to be used for determining whether two offenses should be considered the same for double jeopardy purposes: "[t]he applicable rule is that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied . . . is whether each provision requires proof of a fact which the other does not"); *Gianiny v. State*, 320 Md. 337, 347-48, 577 A.2d 795, 800 (1990) (holding that where defendant was "convicted of and punished (fined) for the lesser included offense of negligent driving, no matter how that conviction came about, he cannot be prosecuted for the greater offense of vehicular manslaughter"); *Middleton v. State*, 318 Md. 749, 756, 569 A.2d 1276, 1279 (1990) (recognizing that Maryland common law principles also protect individuals from being put in jeopardy for the same offense).

165. *White*, *supra* note 3, at 1409; see *Hoiles v. United States*, 10 D.C. (3 MacArth.) 370, 373 (1879) ("To divide one larceny into several because there were several owners of the property, is contrary to the constitutional guaranty and the spirit of the common law. . . ."); *Nelson v. State*, 628 P.2d 884, 897 (Alaska 1981) ("[T]he single larceny rule is implicit in the spirit of our state constitutional protection against double jeopardy and should therefore be adopted in Alaska."); *Hearn v. State*, 55 So. 2d 559, 561 (Fla. 1951) (en banc) ("[T]o permit the dividing into several larcenies of objects which are the subject of larceny, although belonging to separate owners, when stolen at the same time . . . would be violative of the . . . [principle that] a man should not be put in jeopardy twice for the same offense.").

166. *White*, *supra* note 3, at 1409.

167. *White*, 348 Md. at 196, 702 A.2d at 1271.

168. See *Govostis v. State*, 74 Md. App. 457, 471, 538 A.2d 338, 345 (1988).

consistent with Maryland law and with the Maryland Consolidated Theft Statute. Furthermore, the court's decision is consistent with the overwhelming majority of jurisdictions in the United States.¹⁶⁹

The court's only shortcoming was its failure to fully consider the constitutional and fairness reasons for adopting the single larceny doctrine. These additional reasons are very convincing; they show the effect that the doctrine, or lack thereof, can have on the functioning of our criminal justice system and the working of justice more generally. Nonetheless, the court's failure to discuss these arguments is not fatal to its argument.

At this juncture, one critical question remains: How will the single larceny doctrine be applied in Maryland? The single larceny doctrine applies to thefts that occur in the same time and place, or as parts of a single transaction. Commentators recognize that "there is some diversity in the construction of these requirements and in the manner in which they have been applied to various fact situations."¹⁷⁰ While the court's decision to adopt the doctrine is commendable, it is but one step in a series of steps that still need to be taken. Knowing when to apply the single larceny doctrine to a particular set of facts remains unclear. In order to clarify the law, the Court of Appeals will have to formulate more specific guidelines for the doctrine's application.

CHRISTINA E. McDONALD

B. Maryland Courts Accomplish Policy Goal of Preserving Pleas

In *Yoswick v. State*,¹⁷¹ the Court of Appeals considered whether a trial court must advise a defendant of the parole consequences of a sentence when he or she pleads guilty in order for the plea to comply with the requirement that a plea be "knowing" and "voluntary."¹⁷² The court resolved the issue by characterizing parole eligibility as a collateral consequence, which may be omitted from the court's explanation, rather than a direct consequence of a plea, which must be communicated.¹⁷³ The court further rejected Yoswick's argument that his sentence effectively constituted a mandatory minimum sen-

169. See *supra* note 72 and accompanying text.

170. See White, *supra* note 3, at 1410.

171. 347 Md. 228, 700 A.2d 251 (1997).

172. *Id.* at 239, 700 A.2d at 256; see also *infra* note 194 (explaining the statutory conditions precedent to a court's acceptance of a defendant's guilty plea).

173. *Yoswick*, 347 Md. at 240, 700 A.2d at 256-57.

tence, which would have to have been disclosed prior to the plea.¹⁷⁴ The court also contemplated whether incorrect advice, arguably received from defendant's counsel violated the Sixth Amendment¹⁷⁵ right to effective assistance of counsel, and was therefore grounds for vacating a guilty plea.¹⁷⁶ The court held that the defendant must demonstrate that counsel's error prejudiced the plea, and specifically, in the present case, that there was not a sufficient showing of prejudice.¹⁷⁷ By preserving the plea, the court conformed to the general policy, advanced by the United States Supreme Court, of discouraging the formation of new avenues to overturn pleas.¹⁷⁸

1. *The Case.*—On February 25, 1992, David Teddy Yoswick abducted an acquaintance, Frank Storch, and detained him by handcuffing him and locking him in the bathroom of a Howard County motel room.¹⁷⁹ The next day, Yoswick drove Storch to Carroll County where he stabbed Storch in the stomach and attempted to drown him in a creek.¹⁸⁰ Although Storch was still alive, Yoswick thought he was dead and fled the scene.¹⁸¹ Two days later, Yoswick disposed of the physical evidence of his crimes in a Baltimore City landfill.¹⁸² Shortly thereafter, Yoswick was indicted in Carroll County on twenty counts of criminal activity.¹⁸³ At that time, charges were pending against Yoswick in Howard and Anne Arundel Counties as well.¹⁸⁴

174. *Id.* at 243, 700 A.2d at 258.

175. The Sixth Amendment provides in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." U.S. CONST. amend. VI. The Supreme Court has held that this provision carries no weight unless it also includes the right to the effective assistance of counsel. *See, e.g., Strickland v. Washington*, 466 U.S. 668, 686 (1984) (declaring that "the right to counsel is the right to the effective assistance of counsel"); *McMann v. Richardson*, 397 U.S. 759, 771 n.14 (1970) (same).

176. *Yoswick*, 347 Md. at 231, 700 A.2d at 252.

177. *Id.* at 244-46, 700 A.2d at 259. According to the court, the Petitioner was unable to show that "but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *Id.* at 245, 700 A.2d at 259 (citing *Hill v. Lockhart*, 474 U.S. 52, 59 (1985)).

178. *See infra* notes 301-302 and accompanying text (discussing *United States v. Timmreck*, 411 U.S. 780 (1979), which stands for the proposition that pleas should be difficult to overturn).

179. *Yoswick*, 347 Md. at 232, 700 A.2d at 253.

180. *Id.* at 232-33, 700 A.2d at 253.

181. *Id.* at 233, 700 A.2d at 253.

182. *Id.*

183. *Id.* at 231, 700 A.2d at 252.

184. *Id.* at 246-47, 700 A.2d at 260.

On August 31, 1992, Yoswick pled guilty to attempted first degree murder and kidnapping.¹⁸⁵ Pursuant to a plea agreement arranged between Yoswick's attorney and the State's Attorney's Office, Yoswick was sentenced to life for the charge of attempted first degree murder, with all but forty years suspended.¹⁸⁶ Additionally, he was sentenced to life with all but thirty years suspended on the kidnapping charge.¹⁸⁷ The two sentences were to be served concurrently.¹⁸⁸ As part of the agreement, the State's Attorney entered a nolle prosequi¹⁸⁹ to the remaining eighteen charges and recommended that charges pending in Howard and Anne Arundel Counties be dropped.¹⁹⁰ Prior to the plea agreement, and if convicted of all potential charges in Carroll County, Yoswick faced a prison sentence of life imprisonment plus seventy years.¹⁹¹ The charges in other jurisdictions could have amounted to one hundred years in prison.¹⁹²

On April 14, 1994, Yoswick filed a Petition for Post Conviction Relief, and on August 15, 1994, he filed an amended petition.¹⁹³ The petition contended that Yoswick's plea was neither knowing nor voluntary, as required by Maryland Rule 4-242(c),¹⁹⁴ because the trial court failed to disclose the number of years Yoswick must serve prior to becoming eligible for parole.¹⁹⁵ He supported his position by arguing that his plea in effect triggered a mandatory minimum sentence that he must serve before he would be eligible for parole,¹⁹⁶ as the

185. *Id.* at 231-32, 700 A.2d at 253.

186. *Id.*, 700 A.2d at 252-53.

187. *Id.* at 231, 700 A.2d at 253.

188. *Id.*

189. A nolle prosequi is a "declaration of record from the legal representative of the government, that he will no further prosecute the particular indictment or some designated part thereof." *Ward v. State*, 290 Md. 76, 83, 427 A.2d 1008, 1012 (1981) (internal quotation marks omitted) (quoting 2 JOEL PRENTISS BISHOP, *NEW CRIMINAL PROCEDURE* § 1387, at 1194 (2d ed. 1913)).

190. *Yoswick*, 347 Md. at 232, 700 A.2d at 253.

191. *Id.*

192. *Id.*

193. *Id.*

194. *Id.* at 235, 700 A.2d at 254. Maryland Rule 4-242(c) provides:

The court may accept a plea of guilty only after it determines, upon an examination of the defendant on the record in open court conducted by the court, the State's Attorney, the attorney for the defendant, or any combination thereof, that (1) the defendant is pleading voluntarily, with the understanding of the nature of the charge and the consequences of the plea; and (2) there is a factual basis for the plea.

MD. RULE 4-242(c).

195. *Yoswick*, 347 Md. at 238-39, 700 A.2d at 256.

196. *Id.* at 242, 700 A.2d at 258 (noting Yoswick's contention that "the trial court in essence imposed a mandatory minimum sentence of fifteen years").

statute required those sentenced to a life term to serve fifteen years before being eligible for parole.¹⁹⁷ Yoswick argued that a mandatory sentence is a direct consequence of a plea.¹⁹⁸ Because he was unaware of the statutory sentencing requirement at the time he rendered the plea, he contended that he did not plead "with understanding of the . . . consequences."¹⁹⁹ Yoswick also claimed that he was unaware that his parole eligibility was contingent upon approval from the Governor.²⁰⁰ Yoswick stated that, had he known of the restrictions on his parole eligibility, he would not have pled guilty.²⁰¹

Yoswick argued in the alternative that he received ineffective assistance of counsel because the information his attorney gave him regarding the parole consequences of his plea was erroneous, and therefore, his plea should be vacated.²⁰² In August 1992, Yoswick spoke to his counsel, Linda Ostovitz, about the parole consequences of his plea.²⁰³ Ostovitz had previously telephoned the Parole Commission to inquire about the parole eligibility that accompanies a forty-year sentence.²⁰⁴ According to Ostovitz, she was told that a prisoner must serve approximately one quarter of his sentence before becoming eligible for parole.²⁰⁵ Based on this information and the belief that Yoswick would be serving a forty-year sentence, Ostovitz told Yoswick that he would have to serve a minimum of ten years before becoming eligible for parole.²⁰⁶ The court subsequently sentenced him

197. The law that pertained to sentencing at the time Yoswick pled guilty read:

Except as provided in paragraphs (2) and (3) of this subsection, a person who has been sentenced to life imprisonment is not eligible for parole consideration until the person has served 15 years or the equal of 15 years when considering the allowances for diminution of period of confinement provided for in Article 27, § 700 and Article 27, § 638C of the Code.

MD. ANN. CODE art. 41, § 4-516(b)(1) (1990). Section 4-516(b) was subsequently amended to become section 4-516(d), but the legislature made no changes to the text of the statute. MD. ANN. CODE art. 41, § 4-516(d) (1997).

198. *Yoswick*, 347 Md. at 242, 700 A.2d at 258.

199. *Id.* at 238, 700 A.2d at 256. See *supra* note 194 and accompanying text for a discussion of the statutory requirements a court must satisfy before accepting a guilty plea.

200. *Yoswick*, 347 Md. at 238-39, 700 A.2d at 256. The statute required a prisoner serving a life sentence to obtain approval of the Governor in order to be paroled. See MD. ANN. CODE art. 41, § 4-516(b)(4) ("If eligible for parole under this subsection, an inmate serving a term of life imprisonment and a person serving a term of life imprisonment who is confined at Patuxent Institution as an eligible person shall only be paroled with the approval of the Governor.").

201. *Yoswick*, 347 Md. at 238-39, 700 A.2d at 256.

202. *Id.* at 236, 700 A.2d at 254.

203. *Id.*

204. *Id.*, 700 A.2d at 255.

205. *Id.*

206. *Id.*, 700 A.2d at 254.

to life in prison with all but forty years suspended.²⁰⁷ This alteration in sentencing increased the number of years that he must serve before he will become eligible for parole to fifteen years.²⁰⁸ At the post-conviction hearing, Ostovitz testified that she did not remember if she informed Yoswick of this change.²⁰⁹ Yoswick argued that the incorrect information he received about his parole eligibility directly prejudiced his defense, and therefore, deprived him of his Sixth Amendment right to effective counsel.²¹⁰ In support of this contention, he cited extensive case law which states that if a defense is prejudiced by deficient performance of counsel, the resulting plea should be vacated.²¹¹

A post-conviction hearing was held in the Circuit Court for Carroll County; that court rejected Yoswick's claims and upheld his plea.²¹² The circuit court held that a defendant must be informed only of the direct consequences of his plea, and that parole eligibility is not a direct consequence.²¹³ The court further held that, assuming counsel had misinformed Yoswick as he contended, the error did not constitute ineffective assistance of counsel because Yoswick was unable to support his claim that the misinformation prejudiced his plea.²¹⁴ The Court of Special Appeals affirmed the circuit court, holding that the parole consequences of a plea are collateral to the plea, and therefore need not be communicated to a defendant before he pleads guilty.²¹⁵ The Court of Special Appeals further concluded that, even assuming he had been misinformed, Yoswick did not suffer from ineffective assistance of counsel because he was unable to establish that his plea had been prejudiced by the communicated misinformation.²¹⁶ The Court of Appeals granted certiorari to consider an issue

207. *Id.*, 700 A.2d at 255.

208. *See supra* note 197 and accompanying text (increasing the minimum time served to 15 years).

209. *Yoswick*, 347 Md. at 236, 700 A.2d at 255.

210. *Id.* at 244, 700 A.2d at 259.

211. *See Hill v. Lockhart*, 474 U.S. 52, 57 (1985) (applying the *Strickland* two-prong test to challenges to guilty pleas based on ineffective assistance of counsel); *Strickland v. Washington*, 466 U.S. 668, 687, 694 (1984) (requiring petitioner to prove that counsel's performance was not reasonably effective, and that there was a reasonable probability that counsel's errors prejudiced the judgment, to establish ineffective assistance of counsel); *Williams v. State*, 326 Md. 367, 373-75, 605 A.2d 103, 106-07 (1992) (applying the *Strickland* test to assess effectiveness of counsel); *Bowers v. State*, 320 Md. 416, 426-27, 578 A.2d 734, 739 (1990) (applying the *Strickland* test and clarifying the "reasonable probability" prong of that analysis).

212. *Yoswick*, 347 Md. at 232, 700 A.2d at 253.

213. *Id.* at 237, 700 A.2d at 255.

214. *Id.*

215. *Id.* at 238, 700 A.2d at 256.

216. *Id.* at 237, 700 A.2d at 255.

of first impression, whether parole consequences are direct or collateral consequences of a guilty plea.²¹⁷

2. *Legal Background.*—In *Yoswick*, the Court of Appeals considered whether parole eligibility is a collateral consequence of a guilty plea, and therefore, does not require the trial court judge to communicate those consequences before a plea may be accepted.²¹⁸ The court also examined the lower courts' determination that *Yoswick's* defense was not prejudiced by incorrect information received from counsel regarding parole consequences of his plea.²¹⁹

a. *Maryland Rule 4-242(c).*—In Maryland, a guilty plea may be accepted by the court only after the court determines that the plea was given "voluntarily, with understanding of the nature of the charge and the consequences of the plea," and that there is a factual basis for the plea.²²⁰ Maryland Rule 4-242(c) ensures the voluntary and knowing character of a plea by requiring either the judge or one of the attorneys to examine the defendant on the record and in open court.²²¹ The examination includes asking the defendant if he understands that he is waiving a right to a jury trial, that the State would be required to prove its case beyond a reasonable doubt, and that he is waiving both the right to testify on his own behalf and the right to confront his accusers.²²² After considering these factors, the trial judge will accept a plea if he is convinced that the defendant understands the plea and is rendering it voluntarily.²²³

b. *Direct or Collateral Consequences.*—In *Yoswick*, the Court of Appeals's decision turned on whether parole consequences constitute direct or collateral consequences of a plea.²²⁴ This determination is essential because a direct consequence of a plea that is undisclosed to a defendant renders the plea "unknowing" and "involuntary."²²⁵

The purpose of the distinction is to ensure that defendants are aware of the important factors that will result from waiving the right to

217. *Id.* at 241, 700 A.2d at 257.

218. *Id.*

219. *Id.* at 244, 700 A.2d at 259.

220. See MD. RULE 4-242(c). See also *supra* note 194 for the text of the rule.

221. See MD. RULE 4-242(c).

222. *Id.*; see also *English v. State*, 16 Md. App. 439, 441, 298 A.2d 464, 466 (1973) (restating the "standard applicable to waiver of constitutional rights" when accepting a guilty plea).

223. MD. RULE 4-242(c).

224. See *Yoswick*, 347 Md. at 238, 700 A.2d at 256.

225. See *id.* at 231, 700 A.2d at 252.

trial while recognizing that it would be impossible to communicate every possible result stemming from a guilty plea.²²⁶ While the distinction originated in federal courts,²²⁷ it has also been adopted by many states.²²⁸ For example, the Supreme Court of Indiana deemed information regarding the impact a defendant's parole status would have on his sentencing to be collateral, and therefore, not necessary for the trial court to communicate prior to accepting a guilty plea.²²⁹ Additionally, several state courts have labeled deportation possibilities that stem from guilty pleas to be collateral consequences.²³⁰ On the other hand, state courts usually deem a mandatory sentence to be a direct consequence that must be communicated to a defendant for his plea to be knowing and voluntary.²³¹

Maryland courts have required that the trial court must only inform defendants of the direct consequences of a plea. For example, in *Daley v. State*,²³² the Court of Special Appeals construed the phrase "consequences of the plea" to mean that the trial judge has the duty to inform defendants of "direct consequences of pleading guilty, such as the maximum potential sentence."²³³ The court attempted to illuminate the definition of "direct" by stating that "a consequence was considered to be direct only if 'the result represents a definite, immediate and largely automatic effect on the range of the defendant's punishment.'"²³⁴ In *Moore v. State*,²³⁵ the Court of Special Appeals construed Maryland Rule 4-242's requirement that a defendant's plea must be

226. See *Cuthrell v. Patuxent Inst.*, 475 F.2d 1364, 1365-66 (4th Cir. 1972) (recognizing the impracticality of informing every defendant of every ancillary result of a guilty plea).

227. See *United States v. Ready*, 460 F.2d 1238, 1239 (4th Cir. 1972) (per curiam) (distinguishing between direct consequences and ancillary or consequential results of a plea); *Johnson v. United States* 460 F.2d 1203, 1204 (9th Cir. 1972) (per curiam) (same); *United States v. Sambro*, 454 F.2d 918, 920 (D.C. Cir. 1971) (per curiam) (same).

228. See, e.g., *Tafoya v. State*, 500 P.2d 247, 251 (Alaska 1972) (distinguishing between direct and collateral consequences of a plea); *State v. Coban*, 520 So. 2d 40, 41 (Fla. 1988) (same); *Daley v. State*, 61 Md. App. 486, 488, 487 A.2d 320, 321 (1984) (same); *State v. Bailey*, 545 A.2d 206, 209-10 (N.J. Super. Ct. App. 1988) (same).

229. *Morlan v. State*, 499 N.E.2d 1084, 1086 (Ind. 1986) (holding the parole board's action to be a collateral consequence of the defendant's plea).

230. See, e.g., *Tafoya*, 500 P.2d at 251 (holding that deportation consequences were collateral to guilty pleas); *Williams v. State*, 641 N.E.2d 44, 47 (Ind. Ct. App. 1994) (same).

231. See, e.g., *Coban*, 520 So. 2d at 42 (holding that an automatic minimum sentence of 25 years must be communicated before a plea will be accepted as knowledgeable); see also *supra* notes 251-258 and accompanying text (discussing cases in which mandatory minimum sentences were deemed to be direct consequences of the pleas).

232. 61 Md. App. 486, 487 A.2d 320 (1985).

233. *Id.* at 488, 487 A.2d at 321.

234. *Id.* at 489, 487 A.2d at 322 (quoting *Cuthrell v. Patuxent Inst.*, 475 F.2d 1364, 1366 (4th Cir. 1973)).

235. 72 Md. App. 524, 531 A.2d 1026 (1987).

"with understanding of the consequences" to refer only to direct consequences, not collateral ones.²³⁶ The *Moore* court found that in distinguishing direct from collateral consequences, "[c]ourts generally hold that for the plea to be accepted, the defendant must be made aware of the former, but not the latter."²³⁷ Prior to *Yoswick*, the Court of Appeals had not considered whether parole eligibility fell within the category of "direct consequences."²³⁸ Therefore, an examination of other state and federal approaches is informative.

In the federal context, Rule 11 of the Federal Rules of Criminal Procedure requires a defendant to be advised of the "mandatory minimum penalty provided by law, if any, and the maximum possible penalty provided by law."²³⁹ In *Hunter v. Fogg*,²⁴⁰ the defendant argued that because he was either not told or misinformed about the minimum period of imprisonment that might be set by the parole board, his guilty plea was not voluntarily entered, and therefore violated Rule 11.²⁴¹ The United States Court of Appeals for the Second Circuit rejected the defendant's argument; the court held that the Advisory Committee's notes accompanying Rule 11 clearly indicated that the drafters did not intend to include possible parole consequences as information that must be communicated to the defendant prior to a plea.²⁴² The United States Supreme Court went further in *United States v. Timmreck*²⁴³ by holding that a violation of Rule 11 does not by itself justify collateral relief from a plea.²⁴⁴ The Court stressed that such a violation is not constitutional in magnitude and may not be grounds for vacating a plea unless the error results in a "complete miscarriage of justice"²⁴⁵ or the proceeding is "inconsistent with the

236. *Id.* at 526, 531 A.2d at 1027.

237. *Id.*

238. *Yoswick*, 347 Md. at 241, 700 A.2d at 257 (noting that the question of parole eligibility as a direct or collateral consequence of a guilty plea "is an issue of first impression for this Court").

239. FED. R. CRIM. P. 11.

240. 616 F.2d 55 (2d Cir. 1980).

241. *Id.* at 58.

242. *Id.* at 60; see also FED. R. CRIM. P. 11 advisory committee's note. In discussing whether to require trial courts to inform defendants of parole eligibility that results from pleas, the advisory committee concluded that such information is not required. The committee contemplated instances where parole eligibility "may be so complicated that it is not feasible to expect a judge to clearly advise the defendant." *Id.*

243. 441 U.S. 780 (1978).

244. *Id.* at 783-84.

245. *Id.* (quoting *Hill v. United States*, 368 U.S. 424, 428 (1961)).

rudimentary demands of fair procedure.”²⁴⁶ The Court expressed its desire to avoid creating judicial avenues by which to overturn pleas.²⁴⁷

State courts considering the consequence of parole eligibility generally hold that it is a collateral consequence of a plea and therefore not necessary to disclose to the defendant.²⁴⁸ However, courts often consider parole consequences to be a direct consequence of the plea that must be communicated to the defendant if the plea results in the requirement that the defendant serve a minimum statutory sentence before becoming eligible for parole.²⁴⁹ In those cases, if the defendant is not informed of the parole consequences of the mandatory minimum sentence, the plea will be vacated.²⁵⁰ For example, in *Washington v. State*,²⁵¹ the defendant was misinformed about a statutory mandatory sentence during his sentencing hearing; the judge and his attorney failed to tell the defendant that under the statute he would not be eligible for parole for ten years.²⁵² The Mississippi Supreme Court held that a defendant was entitled to an evidentiary hearing to determine whether his plea was voluntary.²⁵³

In *Robinson v. State*,²⁵⁴ the Oklahoma Court of Criminal Appeals considered a defendant's argument that his guilty plea should be vacated because he was not informed that his particular charge would make him ineligible for parole.²⁵⁵ The court denied relief because the defendant made no showing that the plea resulted in parole ineligibility, but stated that where a “statutory mandate” has “a definite practical consequence,” it must be disclosed to the defendant.²⁵⁶ Furthermore, the *Robinson* court characterized the diminution of the pa-

246. *Id.*

247. *Id.* at 784 (citing *United States v. Smith*, 440 F.2d 521, 528-29 (1971) (Stevens, J., dissenting)).

248. See, e.g., *State v. Coban*, 520 So. 2d 40, 42 (Fla. 1988) (suggesting that parole eligibility is usually a collateral consequence of a guilty plea); *Smith v. State*, 329 S.E.2d 507, 508-09 (Ga. Ct. App. 1985) (holding that parole eligibility is a collateral consequence of a plea and that the trial court may assume a defendant has apprised himself of such consequences).

249. See *Coban*, 520 So. 2d at 42 (concluding that a mandatory sentence was a direct consequence of the guilty plea when the sentence was “triggered” by the plea, and the court had no discretion on whether to impose the sentence).

250. See *id.* (observing that, because a mandatory minimum sentence requirement impacts a defendant's opportunity for parole, failure to advise the defendant of such a sentence renders a guilty plea involuntary).

251. 620 So. 2d 966 (Miss. 1993).

252. *Id.* at 968-70.

253. *Id.* at 970.

254. 806 P.2d 1128 (Okla. Crim. App. 1991).

255. *Id.* at 1130-31.

256. *Id.* at 1131.

role period as being within the control of the Department of Corrections, an area outside the control of the judiciary.²⁵⁷ Consequently, "a sentencing judge has no enforceable expectations with respect to the actual release of a sentenced defendant short of his statutory term."²⁵⁸

In *State v. Coban*,²⁵⁹ the Supreme Court of Florida declared that only parole consequences that arise from mandatory minimum sentences may be labeled direct consequences of a plea.²⁶⁰ The court held that under "the narrow circumstances" of that case—when a "mandatory sentence is triggered by the plea and the court has no discretion on whether to impose [the] automatic sentence"—the sentence is a direct consequence of the plea.²⁶¹ Furthermore, the court emphasized that "parole eligibility is normally a collateral consequence of a guilty plea."²⁶²

c. Prejudice.—Most courts that characterize statutory limitations on parole eligibility as direct consequences of pleas further require the defendant to demonstrate that he or she was prejudiced by the deficiency in order for the plea to be vacated.²⁶³

In *State v. Bailey*,²⁶⁴ the Superior Court of New Jersey held that a statutorily imposed parole ineligibility period constituted a direct consequence of a plea, and therefore was required to be disclosed to the defendant prior to his plea.²⁶⁵ Additionally, however, prior to vacating a guilty plea, the defendant was required to show that the failure to inform him of the parole ineligibility "would have made a difference in his decision to plead."²⁶⁶

Similarly, in *In re Moser*, the California Supreme Court divided the inquiry of whether parole consequences must be communicated

257. *Id.*

258. *Id.*

259. 520 So. 2d 40 (Fla. 1988).

260. *Id.* at 42.

261. *Id.*

262. *Id.* at 41-42.

263. See, e.g., *In re Moser*, 862 P.2d 723, 729 (Cal. 1993) (in bank) (explaining that a defendant must show that he or she was prejudiced by a trial court's misadvisement to be entitled to relief); *State v. Bailey*, 545 A.2d 206, 211 (N.J. Super. App. Div. 1988) ("Whether a defendant should be permitted to vacate his plea 'ought to be decided on a case-by-case basis, depending on whether the accused can be said to have been prejudiced by the omission.'" (alteration in original) (quoting *State v. Taylor*, 403 A.2d 889, 895 (N.J. 1988))).

264. 545 A.2d 206 (N.J. Super. Ct. App. Div. 1988).

265. *Id.* at 210.

266. *Id.* at 211 (citing *State v. Howard*, 539 A.2d 1203, 1203 (N.J. 1988)). The *Bailey* court remanded the case to the trial court for a hearing on these issues.

before accepting a guilty plea into two parts.²⁶⁷ First, the court held that “a mandatory term of parole is a ‘direct consequence’ of a plea and thus a matter of which a trial court is obligated to advise a defendant.”²⁶⁸ Second, the court imposed a prejudice requirement on the defendant, holding that relief from the plea was available “only if the defendant establishes that he or she was prejudiced by the misadvisement, i.e., that the defendant would not have entered the plea of guilty had the trial court given the proper advisement.”²⁶⁹

d. Ineffective Counsel.—Defendants seeking to have their guilty pleas vacated often argue that their pleas resulted from denial of effective assistance of counsel.²⁷⁰ Such claims are governed by a two-prong test first set forth in *Strickland v. Washington*.²⁷¹ That case, which involved a sentencing hearing, required a defendant to first prove that his counsel’s performance was deficient. The second prong of the test—prejudice—required a showing that, but for the attorney’s errors, the defendant’s proceeding would have ended differently.²⁷² Two terms later, in *Hill v. Lockhart*,²⁷³ the court held that the two-prong *Strickland* analysis applied to a claim of ineffective assistance of counsel “arising out of the plea process.”²⁷⁴ Explaining that the first prong of the test remains identical, the Court clarified the second prong with respect to pleas: “[I]n order to satisfy the ‘prejudice’ requirement, the defendant must show that there is a reasonable probability that, but for counsel’s errors, he would not have pleaded guilty and would have insisted on going to trial.”²⁷⁵

Prior to *Yoswick*, Maryland had not had the opportunity to address an ineffective assistance of counsel claim in the context of a guilty plea. Maryland courts had, however, adopted the *Strickland* test to determine whether an error by counsel violated the defendant’s

267. 862 P.2d 723, 729 (Cal. 1993) (in bank).

268. *Id.*

269. *Id.* The *Moser* court also remanded the case for a hearing as to whether the defendant was prejudiced by the misinformation.

270. See, e.g., *Strickland v. Washington*, 466 U.S. 668, 678 (1984) (establishing the test to be used in assessing a claim of ineffective assistance of counsel).

271. 466 U.S. 668 (1984).

272. See *Strickland*, 466 U.S. at 694 (requiring a “reasonable probability” that the result of the defendant’s trial would have been different in order to find that the defendant was prejudiced).

273. 474 U.S. 52 (1985).

274. *Id.* at 57.

275. *Id.* at 59 (noting that the Second, Fifth, Seventh, and Eighth Circuits had already adopted this approach).

Sixth Amendment right to effective counsel.²⁷⁶ In *Bowers v. State*,²⁷⁷ the Court of Appeals clarified the standard used to measure the second prong of the test, prejudice. After much discussion, the court announced that a defendant must prove that had his counsel's errors not occurred, there was a "substantial possibility" that the outcome would have been different.²⁷⁸

3. *The Court's Reasoning.*—In *Yoswick v. State*, the Court of Appeals held that parole eligibility is not a direct consequence of a guilty plea, and therefore, the trial court was not required to inform Yoswick of his parole eligibility before accepting his plea.²⁷⁹ Further, the court held that the defendant's ineffective counsel claim was without merit; no Sixth Amendment violation occurred.²⁸⁰

The Court of Appeals determined that the guilty plea entered by Yoswick was made voluntarily and with an understanding of the nature of the consequences of the plea.²⁸¹ The court first reaffirmed that it is "well settled that the Constitution does not require that a defendant be provided with information concerning parole eligibility."²⁸² The court then considered Yoswick's argument that the fifteen year period of parole ineligibility that resulted from his plea in effect constituted a mandatory minimum sentence. The court rejected this argument, stating that the language of Article 41, section 4-516(b) of the Maryland Code, under which Yoswick was sentenced, did not constitute a mandatory sentence²⁸³—one in which "the court has no discretion on whether to impose a particular or automatic sentence."²⁸⁴ Rather, the court held that the trial court "exercise[d] its discretion and imposed a sentence of life with all but forty years suspended."²⁸⁵ In no way did this sentence "change the nature of parole eligibility to make it an automatic, definite, and immediate consequence of pleading

276. See *Bowers v. State*, 320 Md. 416, 425, 578 A.2d 734, 738 (1990) ("As we summarized in *Harris*, a defendant who hopes to show that counsel was ineffective in that sense has the burden of persuading a court that: (1) counsel's performance was deficient, and (2) the deficient performance prejudiced the defense." (citing *Harris v. State*, 303 Md. 685, 696, 496 A.2d 1074, 1079 (1985))).

277. 320 Md. 416, 578 A.2d 734 (1990).

278. *Id.* at 426, 578 A.2d at 739.

279. *Yoswick*, 347 Md. at 231, 700 A.2d at 252.

280. *Id.*

281. *Id.*; see *supra* note 194 (discussing Maryland Rule 4-242(c)).

282. *Yoswick*, 347 Md. at 241, 700 A.2d at 257 (internal quotation marks omitted) (quoting *Meyers v. Gillis*, 93 F.3d 1147, 1153 (3d Cir. 1996)).

283. *Id.* at 242-43, 700 A.2d at 258.

284. *Id.* at 242, 700 A.2d at 258 (citing *State ex rel. Sonner v. Shearin*, 272 Md. 502, 518-19, 325 A.2d 573, 582 (1974); *State v. Coban*, 520 So. 2d 40, 42 (Fla. 1988)).

285. *Id.* at 243, 700 A.2d at 258.

guilty.”²⁸⁶ Therefore, the court rejected Yoswick’s argument that his plea was involuntary.

After holding that failure to advise Yoswick of his parole eligibility did not render his plea involuntary, the court considered Yoswick’s claim that his counsel’s misadvisement about his parole ineligibility rendered this counsel ineffective.²⁸⁷ When Yoswick offered his plea, he was informed by his counsel that he would be eligible for parole in ten years; it was not until later that Yoswick learned he would be required to serve at least fifteen years prior to parole and must gain the Governor’s approval to obtain parole.²⁸⁸ In addressing Yoswick’s contention, the court used the two-part *Strickland/Hill* test to determine if such misinformation had resulted in ineffective assistance of counsel.²⁸⁹ Assuming, without deciding, that Yoswick’s counsel had misinformed him, the court declined to decide the first prong of the test—whether the misinformation constituted deficient misrepresentation.²⁹⁰ Rather, the court grounded its decision in the second prong of the test—prejudice. Under *Strickland* and *Bowers v. State*,²⁹¹ a defendant must show “that there is a ‘substantial possibility’ that but for counsel’s errors, he would not have pleaded guilty and would have insisted on going to trial.”²⁹² The court concluded that Yoswick did not satisfy the “substantial probability” standard.²⁹³ The only evidence that Yoswick produced to show that the misinformation had prejudiced his plea was his own statement that, had he known of the

286. *Id.* At a later point in its decision, the court also noted that Yoswick may not even have to serve fifteen years, as Article 41, section 4-516(b) permits diminution of the sentence for good time credits, as well as education, industrial, or special project credits. *Id.* at 248-49, 700 A.2d at 261; see also MD. ANN. CODE art. 41, § 4-516(b)(1) (1990) (current version at MD. ANN. CODE art. 41, § 4-516(d) (1997)).

287. *Yoswick*, 347 Md. at 244-46, 700 A.2d at 259.

288. *Id.* at 244, 700 A.2d at 259; see *supra* note 197 and accompanying text (discussing the parole eligibility requirements of MD. ANN. CODE art. 41, § 4-516(b)(1)). Yoswick also raised the argument that his counsel’s failure to inform him of the correct parole eligibility consequences rendered his plea involuntary. The court rejected this argument as well, holding that the case relied upon by Yoswick to support his claim, *Margles v. State*, 325 Md. 330, 600 A.2d 851 (1992), was inapplicable to the present situation, since the trial court in *Yoswick* did not make an error. See *Yoswick*, 347 Md. at 243-44, 700 A.2d at 258.

289. *Yoswick*, 347 Md. at 245, 700 A.2d at 259.

290. *Id.* The court quoted *Strickland* in support of its decision not to answer the deficiency question. “If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed.” *Id.* (internal quotation marks omitted) (quoting *Strickland v. Washington*, 466 U.S. 668, 697 (1984)).

291. 320 Md. 416, 578 A.2d 734 (1989).

292. *Yoswick*, 347 Md. at 246, 700 A.2d at 259 (citing *Bowers v. State*, 320 Md. 416, 426, 578 A.2d 734, 739 (1990)).

293. *Id.*

parole consequences, he would not have pled guilty.²⁹⁴ The trial court determined that this statement was merely self-serving.²⁹⁵ The Court of Appeals reviewed the trial court's assessment of Yoswick's credibility.²⁹⁶ In determining that the trial court's decision was not clearly erroneous, the Court of Appeals said that it did not believe that "a reasonable defendant in Yoswick's shoes would have insisted on going to trial even with the benefit of parole eligibility information."²⁹⁷ In reaching this conclusion, the court noted the numerous other charges pending against the defendant; if he had been convicted on all of these crimes, he would have faced a substantially longer prison term.²⁹⁸ Furthermore, the court stressed the strength of the State's case, which it deemed "relevant in determining whether a defendant would have insisted on going to trial."²⁹⁹ The prosecution had overwhelming evidence against Yoswick; therefore, the Court of Appeals concluded that despite his claim to the contrary, it was unlikely that Yoswick would have preferred to go to trial.³⁰⁰

4. *Analysis.*—The limitation that most courts place on the relevance of collateral consequences of a plea stems from pragmatic considerations that originated in the United States Supreme Court.³⁰¹ The Court was concerned about reducing the opportunities for overturning guilty pleas.³⁰² By classifying parole eligibility as a collateral consequence, the Court of Appeals in *Yoswick* eliminated one potential avenue for vacating pleas.³⁰³ Yet the court did recognize an exception to this roadblock in cases where the plea triggers a mandatory

294. *Id.*, 700 A.2d at 259-60.

295. *Id.*, 700 A.2d at 260.

296. *Id.*

297. *Id.*

298. *Id.* at 246-47, 700 A.2d at 260 (noting that Yoswick faced the possibility of a life sentence plus seventy years, in addition to "additional sentences of approximately one hundred years in Howard and Anne Arundel Counties").

299. *Id.* at 247, 700 A.2d at 260 (citing *Ostrander v. Green*, 46 F.2d 347, 356 (4th Cir. 1995)).

300. *Id.*

301. See *United States v. Timmreck*, 441 U.S. 780, 784 (1979) (recognizing that the limitation on collateral attacks "has special force with respect to conviction based on guilty pleas").

302. See *id.* at 784-85 ("Every inroad on the concept of finality undermines confidence in the integrity of our procedures The impact is greatest when new grounds for setting aside guilty pleas are approved because the vast majority of criminal convictions result from such pleas." (internal quotation marks omitted) (quoting *United States v. Smith*, 440 F.2d 521, 528-29 (7th Cir. 1981) (Stevens, J., dissenting))).

303. *Yoswick*, 347 at 241, 700 A.2d at 257 (noting that the Constitution does not require defendants to be informed of collateral consequences prior to their pleas).

minimum sentence.³⁰⁴ Several states fashion this exception by requiring the defendant to show prejudice caused by ignorance of the mandatory sentencing requirements.³⁰⁵ The *Yoswick* court did not hold that it was necessary to show prejudice in cases where a sentence was mandatory, but saved the prejudice requirement for the ineffective counsel analysis.³⁰⁶ Nonetheless, the Court of Appeals provided numerous safeguards to ensure that a plea will not be easily vacated.

a. *Policy Goals.*—In *Timmreck*, the Supreme Court advanced the general policy goal of insuring that pleas will not be vacated on technicalities.³⁰⁷ Expressing concern with the practical ramifications of a permissive approach, the Court reasoned that, since a “vast majority of criminal convictions result from such pleas,” providing methods to overturn them would “undermine confidence in the integrity of [their] procedures.”³⁰⁸ The Court was further concerned that allowing inroads on the concept of finality would increase “the volume of judicial work, [cause] inevitable delays, and impair the orderly administration of justice.”³⁰⁹ Such concerns are justified when one considers that a court does not have the resources to try every case, and therefore relies on a certain percentage to be disposed of through plea agreements.³¹⁰

Although the *Yoswick* court did not discuss the concerns raised in *Timmreck*,³¹¹ it is likely that the Court of Appeals of Maryland was similarly interested in limiting the avenues by which defendants may vacate guilty pleas. Had the *Yoswick* court deemed parole consequences to be direct consequences of pleas, the resulting additional load would inevitably have burdened an already overtaxed state court system. The court did not entirely foreclose on defendants’ ability to

304. *Id.* at 242, 700 A.2d at 258 (“A mandatory minimum sentence is a direct consequence of a guilty plea, and a defendant must therefore be advised of a mandatory minimum sentence in order for the plea to be valid.”).

305. *See supra* note 263 and accompanying text (noting that courts in California and New Jersey have imposed a prejudice requirement in cases of defendants who seek to have their guilty pleas vacated).

306. *Yoswick*, 347 Md. at 244-45, 700 A.2d at 259.

307. *Timmreck*, 441 U.S. at 783-85 (indicating heightened concern for protecting the finality of pleas from collateral attacks).

308. *Id.* (quoting *United States v. Smith*, 440 F.2d 521, 528-29 (7th Cir. 1971) (Stevens J., dissenting)).

309. *Id.*

310. A further concern was aptly expressed by the Superior Court of New Jersey when that court stated, “it is especially obvious that it is literally impossible for a trial judge to convey to an accused the panoply of disabling consequences emanating from a conviction.” *State v. Bailey*, 545 A.2d 206, 209 (N.J. Super. App. Ct. 1988).

311. *See supra* notes 308-309 and accompanying text.

vacate pleas, but allowed flexibility when required in the interests of fairness;³¹² thus the court fulfilled the *Timmreck* policy goals without establishing a rigid rule that may have limited legitimate grievances from being addressed by the courts.

b. Means of Safeguarding Pleas.—In *Yoswick*, the Court of Appeals deemed mandatory sentencing requirements to be direct consequences of pleas.³¹³ In so doing, the court allowed for the possibility of overturning pleas in situations where the court determines the sentence to be “one where the court has no discretion on whether to impose a particular or automatic sentence.”³¹⁴ The court further stated that a mandatory sentence must contain the necessary qualities of a direct consequence: It must have definite, immediate, and largely automatic consequences.³¹⁵ The court did not raise the issue of whether an additional showing of prejudice would be necessary if the sentence was defined as mandatory,³¹⁶ and therefore, this issue will need to be addressed in future cases. The practical result of a prejudice requirement would be to further insulate pleas from being vacated. However, the policy goal in this instance would overwhelm the original purpose of Maryland Rule 4-242—that the plea be voluntary and knowing. To place the extra burden on defendants would prevent a defendant, who truly would not have pleaded guilty had he known of the mandatory nature of his sentence, from vacating his plea unless he had empirical evidence beyond his own subjective intent. Adding the prejudice requirement would, in effect, swallow rule 4-242 since demonstrating that the plea was either unknowing or involuntary would, alone, not be sufficient.³¹⁷

312. *Yoswick*, 347 Md. at 246-48, 700 A.2d at 260 (examining all of the relevant factors of *Yoswick*'s case to determine if he was prejudiced by ineffective counsel).

313. *See id.* at 242, 700 A.2d at 258 (“A mandatory minimum sentence is a direct consequence of a guilty plea . . .”).

314. *Id.*

315. *See id.* at 243, 700 A.2d at 258 (refusing to recognize the 15-year restriction on defendant's parole eligibility as a mandatory sentence because it did not change the nature of parole eligibility to make it an “automatic, definite, and immediate consequence of pleading guilty”).

316. Other cases have required such an additional showing of prejudice when the sentence is deemed mandatory in order to vacate a plea. *See supra* notes 263-269 and accompanying text.

317. *See infra* notes 320-325 accompanying text (discussing the differences between requiring a showing of prejudice in the *Strickland* test for ineffective counsel and in the instance where mandatory sentencing is not communicated and is a direct consequence of the plea).

c. *Ineffective Counsel*.—Yet another level of plea security was introduced in the court's ineffective counsel analysis. Proof that counsel gave erroneous advice was insufficient to vacate a plea.³¹⁸ Instead, the defendant was required to provide additional evidence indicating that the misinformation prejudiced his plea.³¹⁹ Unlike when the prejudice requirement is applied to knowledge of mandatory sentencing,³²⁰ the application of the prejudice requirement to the ineffective counsel analysis does not run afoul of the underlying policy goal of providing defendants with effective counsel. When a trial judge examines the defendant to ensure that a plea is being given knowingly and voluntarily, constitutional rights are attached, such as the right to trial by jury³²¹ and the right to confront one's accuser.³²² Rule 2-424 encapsulates the process by which proper waiver of such rights may be accomplished.³²³ Because questioning of the defendant by the trial judge is the forum where inquiry into waiver of constitutional rights occurs, violation of the rule alone, without extrinsic evidence to prove prejudice, should be grounds for overturning pleas.³²⁴ Conversely, the right to effective counsel is not a simple procedural formula by which to ensure that the defendant understands his option to plead or stand trial. This right, encompassed in the Sixth Amendment,³²⁵ involves inspection of the myriad of decisions and communications that occur between a defendant and his counsel. Furthermore, there is no formula by which to measure effective counsel. It would be impractical to examine each move a counsel makes in his or her defense plan, as the context of each decision is of vital importance as well. Omission of seemingly relevant advice may make perfect sense in the context of a particular case. For these reasons, it is logical to require a showing of prejudice in determining if counsel's errors were truly harmful to the defense.

318. *Yoswick*, 347 Md. at 246, 700 A.2d at 259 (assuming *arguendo* that Yoswick's counsel provided him erroneous advice, but refusing to address the question of whether this constituted deficient performance because of Yoswick's failure to show he was prejudiced by the misinformation).

319. *Id.* at 244, 700 A.2d at 259 ("Petitioner . . . must prove . . . the deficient performance prejudiced the defense.").

320. See text accompanying *supra* notes 316-317 (noting the inconsistency of the policy goals of Maryland Rule 4-242 with requiring prejudice to overturn unknowing and involuntary pleas).

321. U.S. CONST. amend. VI.

322. *Id.* amend. VII.

323. See MD. RULE 2-424(c).

324. This assumes that the violation involves the omission of direct consequences. See *supra* notes 235-237 (discussing the exclusion of collateral consequences from meeting the "unknowing" and "involuntary" standard necessary to overturn pleas).

325. U.S. CONST. amend. VI.

The argument that Yoswick's counsel was ineffective because she had not informed him of the parole consequences of his plea was correctly analyzed under the *Strickland* test.³²⁶ Yoswick was unable to demonstrate that there was a "substantial possibility" that but for his counsel's error, he would not have plead guilty.³²⁷ The test developed by the Maryland courts is an attempt to create an equitable test that weighs plea stability against fair sentencing. In determining if the sentence was fair, the court may examine the strength of the State's case against the defendant.³²⁸ In doing so, the court will have the opportunity to distinguish frivolous petitions for post-conviction relief from instances in which a Petitioner has been truly prejudiced by ineffective counsel. Thus, the prejudice prong of the *Strickland* test poses another obstacle for a defendant who attempts to get a plea vacated, but grants the court the ability to examine all the evidence in order to assess whether that defendant's Sixth Amendment rights were violated.

5. *Conclusion.*—The policy goals enumerated in *Timmreck* are pervasive concerns that reach both state and federal courts. These policy goals justify construction of certain barriers to ensure that valid, informed pleas remain intact. These barriers are countered, however, by concern for defendants' constitutional rights to informed pleas and effective counsel. Both the ineffective counsel test and the collateral versus direct consequences test attempt to balance the tension that sometimes exists between the effective administration of criminal justice on the one hand, and safeguarding the rights of defendants on the other.

The *Strickland* test for determining if an error by a lawyer constitutes ineffective counsel has been well settled since the Supreme Court's analysis in *Strickland*. The test is a substantial obstacle for the defendant to overcome since one must prove both that an error by counsel occurred and that the error prejudiced the defense. However, the test allows the court to assess the fairness of the circumstances surrounding the petitioner's plea. Such an assessment

326. See *Strickland v. Washington*, 466 U.S. 668, 687 (1984) (requiring a defendant to prove that counsel's performance was deficient, and that deficiency was prejudicial to the defense).

327. See *Bowers v. State*, 320 Md. 416, 578 A.2d 734, 739 (1990) (requiring a defendant to demonstrate a "substantial possibility" that a different outcome would have occurred in order to prove prejudice).

328. *Yoswick*, 347 Md. at 247, 700 A.2d at 260 ("The potential strength of the State's case is also relevant in determining whether a defendant would have insisted on going to trial." (citing *Ostrander v. Green*, 46 F.3d 347, 356 (4th Cir. 1995))).

preserves knowledgeable pleas, but leaves ample opportunity to overturn a plea if there has truly been a Sixth Amendment violation.

The direct/collateral consequences distinction, which dictates the scope of the advice required to be given a defendant by the trial court, is also well settled at both the state and federal level. It is a practical outgrowth of the realization that every conceivable consequence of a plea cannot be communicated to each and every defendant. The requirement is logical but becomes strained in the cases where an additional level of prejudice is required to vacate unknowing and involuntary pleas when mandatory sentences are not communicated. The Court of Appeals was not required to decide on whether such a prejudice requirement would be necessary, as the sentence in *Yoswick* was not mandatory. When the issue does arise, the balancing of policy goals would best be reflected by an exclusion of the prejudice requirement from the analysis of whether to vacate a plea where a mandatory sentence was not communicated.

TRACY A. SPRIGGS

V. CRIMINAL PROCEDURE

A. *In Anticipation of Anticipatory Warrants: Maryland's Statutory Barrier and the Meaning of the Court's Restraint*

In *Kostelec v. State*,¹ the Court of Appeals held that Maryland's search warrant statute, Article 27, section 551(a),² does not authorize anticipatory search warrants that are conditioned upon future events.³ Both of Maryland's appellate courts agreed that section 551(a) antedates the modern Fourth Amendment jurisprudence that supports the validity of anticipatory warrants.⁴ The Court of Special Appeals, however, saw *Kostelec v. State* as an opportunity for Maryland to approve anticipatory warrants.⁵ Accordingly, it read the statute in pari materia with the Fourth Amendment, finding that section 551(a) does not prohibit anticipatory warrants.⁶ The Court of Appeals, on the other hand, reversed on the grounds that the statute's plain meaning does not authorize anticipatory warrants.⁷ In so doing, the Court of Appeals exercised judicial restraint that implied the necessity of applying the existing statute, even though this statute does not address modern search and seizure problems. By deciding only the legal issue, the court tacitly, but clearly, referred the question of Maryland's approval of anticipatory warrants to the legislature. Furthermore, the Court of Appeals discussed, but declined to decide, whether evidence wrongly seized under section 551(a) can be suppressed.⁸ The court's reasoning about the reach of section 551(a) and its remedy suggests that the law should be reconciled with modern jurisprudence.

1. *The Case*.—On April 5, 1995, Howard County police intercepted a Federal Express package, searched it under warrant, and discovered a large amount of liquid phencyclidine (PCP).⁹ Upon delivering the package, they arrested the person who accepted the

1. 348 Md. 230, 703 A.2d 160 (1997).

2. MD. ANN. CODE art. 27, § 551(a) (1996).

3. *Kostelec*, 348 Md. at 231, 703 A.2d at 161.

4. *Id.* at 237, 703 A.2d at 163; *Kostelec v. State*, 112 Md. App. 656, 669-70, 685 A.2d 1222, 1229 (1996) (citing cases that compare the early jurisprudence upon which section 551(a) is based with modern Fourth Amendment jurisprudence), *rev'd*, 348 Md. 230, 703 A.2d 160 (1997).

5. *See Kostelec*, 112 Md. App. at 662, 685 A.2d at 1225.

6. *Id.* at 668, 685 A.2d at 1228. The Fourth Amendment provides in pertinent part: "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause" U.S. CONST. amend. IV.

7. *Kostelec*, 348 Md. at 237, 703 A.2d at 163.

8. *Id.* at 240-41, 703 A.2d at 165.

9. *Kostelec*, 112 Md. App. at 661, 685 A.2d at 1225.

package, Randal Lucabaugh.¹⁰ Lucabaugh informed police that some of the PCP was intended for a third party, Roarke Boulton.¹¹ Lucabaugh helped police contact Boulton and arrange delivery.¹² When undercover police officers telephoned Boulton, Boulton instructed them to deliver the entire package.¹³ The delivery location's telephone number and address were listed in the name of the petitioner, Joseph Kostelec.¹⁴

A detective sought an anticipatory search warrant for Kostelec's address and the persons inside.¹⁵ The warrant application set forth the following conditions:

Your affiant will only execute said warrant if the following actions are observed at 5967 Rowanberry Drive [Kostelec's address], within the next fifteen (15) days:

1. A member of the Howard County Police Department will visit the residence at 5967 Rowanberry Drive and present the package containing the [PCP] for delivery.
2. An individual within the residence accepts the package containing the [PCP].
3. This individual is observed to carry the package containing the [PCP] into said residence after the delivery; and
4. Law enforcement officials conduct a constant surveillance of the residence from the time of delivery until the time the warrant is served.¹⁶

The search warrant was expressly conditioned upon future events.¹⁷

On the evening of April 5, 1995, police delivered the package and Kostelec accepted it.¹⁸ Within minutes, an electronic device alerted police that the package had been opened.¹⁹ They immediately made a no-knock entry into Kostelec's residence and found both Kostelec and Boulton with the package. One bottle of PCP had been removed.²⁰ In addition to the PCP, police seized paraphernalia throughout the house including an aluminum can fashioned into a

10. *Kostelec*, 348 Md. at 233, 703 A.2d at 161. The package was addressed to Joey Labaugh. *Id.* at 232, 703 A.2d at 161.

11. *Id.* at 233, 703 A.2d at 161.

12. *Id.*

13. *Id.*

14. *Id.*

15. *Id.*

16. *Id.*, 703 A.2d at 161-62 (second, third, and fourth alterations in original).

17. *See id.*

18. *Id.* at 234, 703 A.2d at 162.

19. *Id.* The police had placed an electronic device in the package to alert them when the package was opened. *Id.*

20. *Id.* The package originally contained two large bottles of PCP. *Id.*

pipe that contained traces of cocaine; another pipe containing traces of cocaine; a pipe containing marijuana residue; and three large bottles of parsley flakes, customarily used as a medium for smoking liquid PCP.²¹

Kostelec was convicted for drug offenses in the Circuit Court for Howard County.²² He immediately appealed, arguing, *inter alia*, that the circuit court erred in denying his motion to suppress evidence seized under the anticipatory search warrant.²³ The Court of Special Appeals noted that the primary issue raised by this appeal—"[w]hether Maryland will or should approve the issuance and use of anticipatory search warrants"—had been anticipated for some time.²⁴ The court held, in accord with a great majority of courts from other jurisdictions,²⁵ that "anticipatory search warrants do not, as a matter

21. *Id.*

22. *Kostelec v. State*, 112 Md. App. 656, 659, 685 A.2d 1222, 1224 (1996), *rev'd*, 348 Md. 230, 703 A.2d 160 (1997). *Kostelec* was sentenced to "five years without parole, to certain concurrent sentences, and to payment of a fine." *Kostelec*, 348 Md. at 235, 703 A.2d at 162.

23. *Kostelec*, 348 Md. at 231, 703 A.2d at 160-61. *Kostelec* also argued that the court made several other errors: the evidence was insufficient to support his conviction; the court excluded an out-of-court statement made by an alleged accomplice as a statement against penal interest; the court refused to permit evidence that he had never used PCP or cocaine; and the court refused to ask a proposed voir dire question. *Kostelec*, 112 Md. App. at 660, 685 A.2d at 1224.

24. *Kostelec*, 112 Md. App. at 662, 685 A.2d at 1225 (quoting *State v. Lee*, 93 Md. App. 408, 420, 613 A.2d 395, 401 (1992), *aff'd*, 330 Md. 320, 624 A.2d 492 (1993)).

25. *See id.* at 664-65, 685 A.2d at 1226-27 (listing cases from other jurisdictions that have held that anticipatory search warrants "do not *per se* offend the Fourth Amendment"); *see also, e.g.*, *United States v. Gendron*, 18 F.3d 955, 965 (1st Cir. 1994) (noting that "the simple fact that a warrant is 'anticipatory' . . . does not invalidate a warrant or make it somehow suspect or legally disfavored"); *United States v. Garcia*, 882 F.2d 699, 702 (2d Cir. 1989) (stating that when there is evidence which tends to show "that delivery of contraband will, or is likely to, occur . . . there is sufficient probable cause to uphold the anticipatory [search] warrant"); *United States v. Dornhofer*, 859 F.2d 1195, 1197-98 (4th Cir. 1988) (upholding the validity of an anticipatory search warrant on the grounds that contraband was on a sure course to its destination); *United States v. Hale*, 784 F.2d 1465, 1468 (9th Cir. 1986) (noting that an anticipatory search warrant is permissible when evidence is "on a sure course to its destination"); *State v. Cox*, 522 P.2d 29, 34 (Ariz. 1974) (finding that "it is reasonable to issue a warrant to be served at some time not unreasonably distant for a crime, as here, that is in progress or it is reasonable to assume will be committed in the near future"); *People v. Sousa*, 22 Cal. Rptr. 2d 264, 270 (Ct. App. 1993) (justifying anticipatory warrants as necessary for effective enforcement of narcotics laws, preferable to warrantless searches, and in accord with the aims of the exclusionary evidence rule); *People v. Favela*, 681 N.E.2d 582, 584 (Ill. App. Ct. 1997) (explaining that "[b]y adopting much of the language of Federal Rule 41(b), the legislature obviously intended to conform this State's law to the federal law and permit the issuance of anticipatory search warrants"); *Commonwealth v. Soares*, 424 N.E.2d 221, 224 (Mass. 1981) (holding that "[n]either logic nor the policies underlying the Fourth Amendment warrant requirement support a general prohibition against the use of anticipatory warrants"); *State v. Doyle*, 336 N.W.2d 247, 252 (Minn. 1983) (suggesting that "conditional warrants are permissible upon a showing of

of law, offend the Fourth Amendment.”²⁶ Furthermore, the court held that such warrants do not violate Article 26 of Maryland’s Declaration of Rights, in *pari materia* with the Fourth Amendment.²⁷

The court then discussed Maryland’s warrant statute,²⁸ section 551(a), which provides in pertinent part:

Whenever it be made to appear to any judge . . . by written application signed and sworn to by the applicant, accompanied by an affidavit . . . containing facts within the personal knowledge of the affiant . . . that there is probable cause, the basis of which shall be set forth in said affidavit . . . to believe that any misdemeanor or felony is being committed by any individual or in any building . . . or that any property subject to seizure under the criminal laws of the State is situated or located on the person of any such individual or in or on any such building, . . . then the judge may forthwith issue a search warrant²⁹

Kostelec contended that the statute required any evidence sought “be situated in the place to be searched at the time the warrant is issued.”³⁰ The court, however, rejected Kostelec’s reading of the statute as too narrow.³¹ According to the court, the statute’s language was “at best, ambiguous”³² because it “could also be read merely to require

probable cause”); *State v. Stott*, 503 N.W.2d 822, 829 (Neb. 1993) (holding that “search warrants are not invalid merely because they are anticipatory in nature”); *State v. Parent*, 867 P.2d 1143, 1145 (Nev. 1994) (per curiam) (finding that “[a]nticipatory search warrants are not unreasonable and are therefore permissible under the Fourth Amendment to the United States Constitution”); *State v. Canelo*, 653 A.2d 1097, 1101-02 (N.H. 1995) (endorsing the First Circuit’s logic that anticipatory warrants do not per se violate the Fourth Amendment); *People v. Glen*, 282 N.E.2d 614, 615 (N.Y. 1972) (ruling that “[n]either the Constitution nor relevant sections of the former Code of Criminal Procedure forbid issuance of a search warrant in advance of the imminent or scheduled receipt of seizable property by the person or at the premises designated in the warrant”); *Commonwealth v. DiGiovanni*, 630 A.2d 42, 45-46 (Pa. Super. Ct. 1993) (following “the lead of the great majority of federal and state cases and approv[ing] the efficacy of anticipatory warrants”); *State v. Sachs*, 216 S.E.2d 501, 514 n.12 (S.C. 1975) (discussing in dicta that federal case law does not support the contention that “probable cause cannot exist when delivery is to be in futuro”); *State v. Engel*, 465 N.W.2d 787, 789 (S.D. 1991) (concluding on the clear weight of authority that “an anticipatory search warrant based on a controlled delivery of contraband to occur in the near future is not unconstitutional per se”); *State v. Coker*, 746 S.W.2d 167, 172 (Tenn. 1987) (observing that “[t]here is respectable authority that anticipatory search warrants do not violate the Fourth Amendment”).

26. *Kostelec*, 112 Md. App. at 668, 685 A.2d at 1228.

27. *Id.*

28. *Id.*

29. MD. ANN. CODE art. 27, § 551(a) (1996).

30. *Kostelec*, 112 Md. App. at 664, 685 A.2d at 1226.

31. *Id.* at 669, 685 A.2d at 1229.

32. *Id.*

that probable cause be present at the time the warrant is executed.”³³ Instead of a literal reading of the words, the court considered their “meaning and effect in light of the setting, the objectives and purpose of the enactment.”³⁴ The court found “[n]othing in the legislative history of § 551(a) [to] support [Kostelec’s] narrow reading of the statute.”³⁵ Accordingly, the court construed section 551(a) in *pari materia* with the Fourth Amendment to hold that anticipatory search warrants do not violate Maryland’s search warrant statute.³⁶

In reaching this decision, the Court of Special Appeals focused on the legislative intent of section 551(a).³⁷ The court cited one authority showing that section 551(a) is in *pari materia* with the Fourth Amendment on the question of probable cause,³⁸ but quoted a different case, *In re Special Investigation No. 228*,³⁹ which stated that the statute and the Federal Constitution “are totally divergent remedies in that they serve different purposes . . . overlap[ing] minimally as they touch probable cause.”⁴⁰ Furthermore, the court, in a parenthetical, noted another Maryland case for the proposition that “§ 551(a) is not an exclusionary rule, [and] in many ways § 551(a) is not *in pari materia* with the Fourth Amendment.”⁴¹ In sum, the court reasoned that section 551(a) differs from the Fourth Amendment in intention and effect, but not on the question of probable cause.⁴²

The Court of Special Appeals then ruled that the other issues raised by the petitioner’s appeal did not constitute error:⁴³ the affidavit supplied probable cause for the warrant;⁴⁴ the evidence was sufficient;⁴⁵ there was no statement against penal interest;⁴⁶ lack of prior

33. *Id.*

34. *Id.* (internal quotation marks omitted) (quoting *Whack v. State*, 338 Md. 665, 672, 659 A.2d 1347, 1350 (1995)).

35. *Id.*

36. *Id.* at 669-70, 685 A.2d at 1229.

37. *Id.*

38. *Id.* (citing *Andresen v. State*, 24 Md. App. 128, 169, 331 A.2d 78, 104, *cert. granted in part* by 423 U.S. 822 (1975), *aff’d*, 427 U.S. 463 (1976)).

39. 54 Md. App. 149, 458 A.2d 820 (1983).

40. *Id.* at 176-77, 458 A.2d at 834 (internal quotation marks omitted), *quoted in Kostelec*, 112 Md. App. at 670, 685 A.2d at 1229.

41. *Kostelec*, 112 Md. App. at 670, 685 A.2d at 1229 (discussing the implications of *Anne Arundel County v. Chu*, 69 Md. App. 523, 528, 518 A.2d 733, 735 (1987) (distinguishing the statutory property right and its remedy of return of evidence wrongly taken from the constitutional right and remedy of exclusion of improper evidence from trial), *aff’d*, 311 Md. 673, 680-81, 537 A.2d 250, 253-54 (1988)).

42. *Id.*

43. *Id.* at 671-78, 685 A.2d at 1230-33.

44. *Id.* at 673, 685 A.2d at 1231.

45. *Id.*

46. *Id.* at 675, 685 A.2d at 1232.

involvement with drugs was not relevant;⁴⁷ and a requested voir dire question was properly omitted.⁴⁸ Therefore, the court affirmed the petitioner's conviction.⁴⁹

The Court of Appeals granted certiorari to review only the following issue: "Whether an anticipatory search warrant, issued on the basis of an affidavit which lacked probable cause that a crime was being committed at the time of issuance . . . is constitutional and in compliance with Article 27, Section 551(a)."⁵⁰

2. *Legal Background.*—In the sixty years since Maryland enacted section 551(a),⁵¹ the law governing search and seizure has changed fundamentally. Section 551(a) emerged from early jurisprudence that protected citizen's *property rights* by restricting the scope of goods that the police could take as evidence.⁵² In contrast, modern Fourth Amendment jurisprudence guarantees *privacy rights* by prohibiting unconstitutional search and seizure.⁵³ Because the principles underlying early and modern jurisprudence are distinctly different, they authorize search and seizure of different scope, provide for different remedies, and, in particular, diverge on the question whether a recent law enforcement tool—the anticipatory warrant—is valid.⁵⁴

a. *Early Search and Seizure Jurisprudence and Property Rights.*—Maryland's warrant statute belongs to a long historical tradition in jurisprudence.⁵⁵ The statute's roots in early search and seizure jurispru-

47. *Id.* at 676, 685 A.2d at 1232.

48. *Id.* at 677, 685 A.2d at 1233.

49. *Id.* at 660, 685 A.2d at 1225.

50. *Kostelec*, 348 Md. at 235, 703 A.2d at 163.

51. *Id.* at 237, 703 A.2d at 163 (stating that the relevant language of section 551(a) dates back to Chapter 749 of the Acts of 1939).

52. *See id.* (stating that section 551(a)'s enactment antedates *Warden v. Hayden*, 387 U.S. 294, 310 (1967), which abolished the "mere evidence rule" according to which the State could only seize fruits and instrumentalities of crime and contraband); *see infra* Part 2.a and accompanying text (discussing early search and seizure jurisprudence in the context of property rights).

53. *See infra* notes 71-81 and accompanying text (discussing the reasoning behind recent developments in Fourth Amendment jurisprudence).

54. *See infra* notes 59-80 and accompanying text.

55. In a Court of Special Appeals opinion, *In re Special Investigation No. 228*, 54 Md. App. 149, 458 A.2d 820 (1983), Judge Moylan presented a valuable and insightful history and analysis of search and seizure jurisprudence, distinguishing section 551(a) from Fourth Amendment law. *Id.* at 156-65, 458 A.2d 820, 824-28. Other Maryland decisions have also contributed to the understanding of this statute in historical context. *See Chu v. Anne Arundel County*, 311 Md. 673, 676, 573 A.2d 250, 251 (1996) (reviewing "the history of exclusionary rules at the federal level and in Maryland"); *Howell v. State*, 60 Md. App. 463, 465, 483 A.2d 780, 780 (1984) (distinguishing section 551(a) from the exclusionary rule); *see also supra* note 41 (discussing the distinction between the exclusionary rule rem-

dence trace back to the theoretical grounds of liberal democracy in the political philosophy of John Locke (1632-1704).⁵⁶ Locke proposed that the end of government was to secure the property of the citizens: "The great and *chief end* . . . of Mens uniting into Commonwealths, and putting themselves under Government, is the *Preservation of their Property*."⁵⁷ Following Locke, the American founders made the preservation of property a central purpose of the new republic.⁵⁸ In the *Federalist Papers*, Madison writes, "[g]overnment is instituted no less for protection of the property than of the persons of individuals."⁵⁹ In accordance with this tenet, the common law not only of England, but also of Maryland, restricted the state's right to take as evidence only those things in which it showed a superior property right.⁶⁰

This property principle informed the "mere evidence rule,"⁶¹ which restricted the state's power of search and seizure to fruits of crime, instrumentalities of crime, and contraband, and denied the state any right to "mere evidence" of crime.⁶² The state had a superior property right in the former, but not in the latter.⁶³ This theory shaped early search and seizure jurisprudence including section 551(a).⁶⁴ The "mere evidence rule" was clearly articulated in *Gould v. United States*,⁶⁵ which held that warrants:

may be resorted to only when a primary right to such search and seizure may be found in the interest which the public or the complainant may have in the property to be seized, or in the right to the possession of it, or when a valid exercise of the police power renders possession of the property by the accused unlawful and provides that it may be taken.⁶⁶

edy to Fourth Amendment violations and the return of property remedy under common law).

56. See JOHN LOCKE, TWO TREATISES OF GOVERNMENT § 124 (Peter Laslett ed., Cambridge Univ. Press (1960) (1689)).

57. *Id.*

58. See THE FEDERALIST NO. 54, at 339 (James Madison) (Henry Cabot Lodge 1961).

59. *Id.*

60. *In re Special Investigation No. 228*, 54 Md. App. at 170, 458 A.2d at 831 (noting the consequences of "the common law of England and of Maryland recogniz[ing] the search warrant for stolen goods, but no other search warrant").

61. *Id.* (citations omitted).

62. *Id.* (citations omitted).

63. *Id.*

64. *Id.* at 172, 458 A.2d at 832.

65. 255 U.S. 298 (1921).

66. *Id.* at 309 (citation omitted).

The Supreme Court abolished the “mere evidence rule” as constitutionally required in 1967 in *Warden v. Hayden*.⁶⁷ The *Hayden* Court analyzed the source of the old rule in repudiating it:

historically the right to search for and seize property depended upon the assertion by the Government of a valid claim of superior interest, and . . . it was not enough that the purpose of the search and seizure was to obtain evidence to use in apprehending and convicting criminals. The common law of search and seizure after *Entick v. Carrington*, 19 How. St. Tr. 1029, reflected Lord Camden’s view, derived no doubt from the political thought of his time, that the ‘great end, for which men entered into society, was to secure their property.’⁶⁸

The *Hayden* Court, with recourse to the principles of the Fourth Amendment, extended the state’s right to the search and seizure of evidence.⁶⁹ The Court reasoned that “if [the mere evidence rule’s] rejection does enlarge the area of permissible searches, the intrusions are nevertheless made after fulfilling the . . . requirements of the Fourth Amendment and after the intervention of a ‘neutral and detached magistrate.’”⁷⁰

b. Modern Fourth Amendment Jurisprudence: Balancing Privacy Rights and Law Enforcement’s Needs.—Modern Fourth Amendment jurisprudence has expanded citizens’ rights against government intrusion not by securing private property, as Maryland’s warrant statute did, but primarily by protecting privacy.⁷¹ The Supreme Court’s decision in *Hayden* based modern search and seizure law on privacy rights.⁷² With the development of citizens’ rights, the state also gained a new power to seize evidence in order to prosecute and convict criminals.⁷³ In sum, “Fourth Amendment jurisprudence has sought to balance individual privacy interests against law enforcement interests.”⁷⁴

67. 387 U.S. 294 (1967).

68. *Id.* at 303.

69. *Id.* at 304 (“We have recognized that the principal object of the Fourth Amendment is the protection of privacy rather than property, and have increasingly discarded fictional and procedural barriers rested on property concepts.”).

70. *Id.* at 309 (quoting *Johnson v. United States*, 333 U.S. 10, 14 (1948)).

71. *See id.* at 304 (reasoning that “the principal object of the Fourth Amendment is the protection of privacy rather than property.”).

72. *Id.* at 310.

73. *Id.* at 306. The Court observed that “it is reasonable, within the terms of the Fourth Amendment, to conduct otherwise permissible searches for the purpose of obtaining evidence which would aid in apprehending and convicting criminals.” *Id.*

74. David P. Mitchell, *Anticipatory Search Warrants: The Supreme Court’s Opportunity to Reexamine the Framework of the Fourth Amendment*, 44 VAND. L. REV. 1387, 1389 (1991) (sug-

In addition to mere property rights, the Fourth Amendment protects the liberty of citizens from undue interference by the state.⁷⁵ This formed the rationale for the Court's warrant requirement for searches and seizures established in *Johnson v. United States*.⁷⁶ The Court added further protection by making the constitutional exclusionary rule applicable to the states in *Mapp v. Ohio*,⁷⁷ and by ruling warrantless searches per se unreasonable in *Katz v. United States*.⁷⁸

While creating these constitutional safeguards, courts have also recognized the legitimate needs of law enforcement to conduct searches in circumstances that make it difficult to comply with the warrant rule.⁷⁹ They have established numerous exceptions to the warrant requirement and to the exclusionary rule.⁸⁰ One such exception is the anticipatory warrant, which the United States Court of Appeals for the Second Circuit ruled served the interests protected by the Fourth Amendment.⁸¹

Many modern courts have ruled that anticipatory warrants comply with the Fourth Amendment on the grounds they do not offend the Reasonableness Clause and they satisfy the Warrant Clause.⁸² Modern courts have recognized that anticipatory warrants meet con-

gesting that an equilibrium between privacy rights and law enforcement needs should be sought).

75. See *Johnson*, 333 U.S. at 14 ("The right of officers to thrust themselves into a home is also a grave concern . . . to a society which chooses to dwell in reasonable security and freedom from surveillance.").

76. 330 U.S. 10, 14 (1948). The Court announced the newly established warrant rule: "When the right of privacy must reasonably yield to the right of search is, as a rule, to be decided by a judicial officer, not by a policeman or government enforcement agent." *Id.*

77. 367 U.S. 643, 655 (1961).

78. 389 U.S. 347, 357 (1967) (establishing that "searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions" (citations omitted)).

79. See *California v. Acevedo*, 500 U.S. 565, 582 (1991) (Scalia, J., concurring) (observing that "[e]ven before today's decision, the 'warrant requirement' had become so riddled with exceptions that it was basically unrecognizable" and noting that law enforcement does not have to comply with the warrant requirement in "searches incident to arrest . . . automobile searches . . . border searches . . . administrative searches of regulated businesses . . . exigent circumstances . . . search[es] incident to nonarrest when there is probable cause to arrest . . . boat boarding for document checks . . . welfare searches . . . inventory searches . . . airport searches . . . school search[es]" (quoting Craig M. Bradley, *Two Models of the Fourth Amendment*, 83 MICH. L. REV. 1468, 1473-74 (1985))).

80. *Id.* (remarking on the more than twenty exceptions to the warrant requirement).

81. See *United States v. Garcia*, 882 F.2d 699, 703 (2d Cir. 1989). The court found that "the purposes of the fourth amendment are best served by permitting government agents to obtain warrants in advance if they can show probable cause to believe that the contraband will be located on the premises at the time that search takes place." *Id.*

82. See *supra* note 25 (listing federal and state court opinions upholding the validity of anticipatory warrants).

temporary law enforcement needs; in particular, they address current problems such as narcotics and child pornography.⁸³ As the answer to the problems of the day, anticipatory warrants represent an innovation too recent to have been considered by early judicial opinions. Nevertheless, *State v. Guthrie*, a case decided in 1897,⁸⁴ provides a rare example of an early opinion that illustrates how “mere evidence” jurisprudence might reason about prospective warrants. In a case about the need to execute warrants promptly, the Supreme Judicial Court of Maine in *Guthrie* commented upon prospective warrants:

[i]t is suggested that the prosecution often needs to obtain search warrants in advance, in order to have them in readiness to seize the liquors at the moment of deposit before they can be concealed; that such a procedure is very efficacious, and even essential, to circumvent the cunning of liquor sellers; and that the rule here evolved will nullify it. If such a practice obtains, it should be nullified.⁸⁵

The *Guthrie* court justified this position on the grounds that “[n]o prosecution can be lawfully begun, no criminal process lawfully issued, before the offense is committed.”⁸⁶ While suggesting the kind of due process concerns that came to prevail after incorporation, in fact this rationale exemplifies the early understanding that the issuance of a search warrant marks the instigation of prosecution or “criminal process.”⁸⁷ By contrast, in the modern view, search warrants are an investigative tool: modern courts regard search warrants as a governmental intrusion into citizens’ privacy that may be reasonable when used to meet contemporary law enforcement needs.⁸⁸

Early jurisprudence’s view of prospective warrants must be explained not only by the notion that warrants initiate prosecution, but also by the restricted scope of search and seizure within the theoretical framework of the “mere evidence” rule. By restricting the state’s power of seizure to only the fruits of crime, instrumentalities of crime, and contraband, the “mere evidence” rule rendered investigative

83. See *People v. Sousa*, 22 Cal. Rptr. 2d 264, 270 (Ct. App. 1993) (“Such warrants recognize that police often must move quickly, ‘especially when dealing with the furtive and transitory activities of persons who traffic in narcotics’” (citation omitted)); in the context of child pornography distribution, see also *United States v. Ricciardelli*, 998 F.2d 8, 10 (1st Cir. 1993) (observing that “[a]nticipatory search warrants are peculiar to property in transit”).

84. 38 A. 368 (Me. 1897).

85. *Id.* at 369-70.

86. *Id.* at 370.

87. *Id.*

88. See *supra* Part 2.b text (discussing modern Fourth Amendment jurisprudence as the balancing of privacy rights and law enforcement needs).

searches unsupportable. In practice, most searches are now investigative, involving forensic evidence such as fingerprints, DNA, ballistics, gunshot primer residue, blood spatter analysis, and controlled dangerous substances, whereas early search and seizure law targeted primarily stolen property.⁸⁹ Modern search warrants facilitate investigative searches without reference to the legal status of the objects of the warrant.⁹⁰

c. Maryland's Section 551(a): Scope and Sanctions.—Maryland's search and seizure statute, now designated section 551(a), was originally adopted in 1939.⁹¹ It provides in pertinent part:

Whenever it may be made to appear to any judge . . . by written application signed and sworn to by the applicant, accompanied by an affidavit . . . containing facts within the personal knowledge of the affiant . . . that there is probable cause, the basis of which shall be set forth in said affidavit . . . to believe that any misdemeanor or felony is being committed by any individual or in any building, apartment, premises, place or thing within the territorial jurisdiction of such judge, or that any property subject to seizure under the criminal laws of the State is situated or located on the person of any such individual or in or on any such building, apartment, premises, place or thing, then the judge may forthwith issue a search warrant directed to any duly constituted policeman . . . authorizing him to search such suspected individual, building, apartment, premises, place or thing, and to seize any property found liable to seizure under the criminal laws of this State, provided that any such search warrant shall name or describe, with reasonable particularity, the individual, building, apartment, premises, place or thing to be searched, the grounds for such search and the name of the applicant on whose written application as aforesaid the warrant was issued⁹²

89. See *In re Special Investigation No. 228*, 54 Md. App. 149, 170, 548 A.2d 820, 831 (1983) (explaining that "the common law of England and of Maryland recognized the search warrant for stolen goods, but no other search warrant").

90. See *Warden v. Hayden*, 387 U.S. 294, 301 (1967) (declaring that "[n]othing in the language of the Fourth Amendment supports the distinction between 'mere evidence' and instrumentalities, fruits of crime, or contraband").

91. *In re Special Investigation No. 228*, 54 Md. App. at 159, 159 n.3, 458 A.2d at 825, 825 n.3. The original statute, Chapter 749 of the Acts of 1939, was later designated as Article 27, section 259A. *Id.*

92. MD. ANN. CODE art. 27, § 551(a) (1996).

The present statute provides sanctions for violations of its terms.⁹³ If the property taken is not that described in the warrant, if there is no probable cause for believing the grounds on which the warrant was issued, or if more than fifteen calendar days pass between the issuance of the warrant and the seizure of the property, "the judge must cause it to be restored to the person from whom it was taken."⁹⁴ The sole sanction, the return of wrongly taken property, is meant not to protect constitutional rights, but to preempt an action in replevin.⁹⁵

Section 551(a) has never authorized the exclusion of evidence seized in violation of its provisions.⁹⁶ In fact, Maryland has never had an exclusionary rule for serious or violent crimes.⁹⁷ A limited exclusionary rule enacted in 1929, the Bouse Act, applied only to certain misdemeanors, primarily bootlegging and gambling.⁹⁸ The Bouse Act was repealed in 1973.⁹⁹ In 1958, legislators proposed a statutory amendment providing for the exclusion of evidence obtained in searches violating either section 551(a) or the Fourth Amendment.¹⁰⁰ This exclusionary rule—proposed even before the Supreme Court made the Fourth Amendment Exclusionary Rule binding on the states in *Mapp v. Ohio*¹⁰¹—never passed.¹⁰² Even if the sanction of section 551(a) were imposed, "the quashing of the warrant did not operate to exclude the evidence, if the State had had the prescience to make copies or photographs of it or had sufficient recollection to testify about it from memory."¹⁰³

d. Anticipatory Search Warrants in Light of the Fourth Amendment.—Three states have held anticipatory search warrants are barred by the plain language of their statute. Neither of the three courts

93. *Id.*

94. *Id.* The legislature added the third provision, requiring that the warrant be executed within fifteen days of issue, in Chapter 81 of the Acts of 1950. *In re Special Investigation No. 228*, 54 Md. App. at 162, 458 A.2d at 827.

95. *In re Special Investigation No. 228*, 54 Md. App. at 164, 458 A.2d at 827-28.

96. *Id.* at 160, 164, 458 A.2d at 825, 828; MD. ANN. CODE art. 27, § 551(a).

97. *In re Special Investigation No. 228*, 54 Md. App. at 159-60, 458 A.2d at 825.

98. *Id.* at 160, 458 A.2d at 825.

99. *Id.*, 458 A.2d at 826. At the time that section 551(a) was enacted, the lack of an exclusionary rule effectively made warrants unnecessary for the investigation of serious crimes. *Id.*, 458 A.2d at 825-26.

100. *Id.* at 163, 458 A.2d at 827.

101. 367 U.S. 643 (1961).

102. *In re Special Investigation No. 228*, 54 Md. App. at 163, 458 A.2d at 827; *see also* Howell v. State, 60 Md. App. 463, 469, 483 A.2d 780, 782 (1984) (observing that "[t]he sanction of exclusion for a violation of § 551 has, therefore, not only never been adopted; it has been affirmatively rejected").

103. *In re Special Investigation No. 228*, 54 Md. App. at 161, 458 A.2d at 826.

ruled formally on the constitutionality of anticipatory warrants under the Fourth Amendment. Rather, their decisions were strictly confined to the reading of their statutes.

In *State v. Gillespie*,¹⁰⁴ the Iowa Supreme Court construed the search warrant statute, Iowa Code, section 808.3.¹⁰⁵ The court held that, because probable cause for the search warrant rested on three conditions that "were not established facts at the time the search warrant was issued . . . the search warrant was invalid."¹⁰⁶ While the lower court, reversed by *Gillespie*, remarked that the statute's language did not contemplate that the conditions constituting probable cause might be met in the future, it construed the statute on the grounds that its language was ambiguous on this point.¹⁰⁷ Accordingly, the lower court read the statute in conformity with the common law and ruled that the anticipatory warrant was valid.¹⁰⁸ The Iowa Supreme Court stated that the statute was not ambiguous; that ambiguities, if they did exist, should be resolved in favor of the defendant; and that no right to issue search warrants existed at common law.¹⁰⁹ The *Gillespie* court, therefore, concluded that "the plain meaning of these statutes is that probable cause must exist at the time the warrant is issued and not at some future time when the warrant is executed."¹¹⁰

In *People v. Poiriez*,¹¹¹ the Supreme Court of Colorado heard an interlocutory appeal by the prosecution.¹¹² The trial court had granted a motion to suppress evidence upon a finding that "an anticipatory warrant is not valid in Colorado."¹¹³ The higher court affirmed that motion for suppression, but held only that "the language of section 16-3-303, 8A C.R.S. (1986), creates a barrier to the issuance of anticipatory warrants by judicial officers."¹¹⁴ The statute contained a requirement that the object of the search warrant had to be present at

104. 530 N.W.2d 446 (Iowa 1995).

105. *Id.* at 448.

106. *Id.* at 449.

107. *Id.* at 448-49.

108. *Id.* at 449.

109. *Id.*

110. *Id.* at 448.

111. 904 P.2d 880 (Colo. 1995) (en banc).

112. *Id.* at 880.

113. *Id.* at 881.

114. *Id.* at 883. The Iowa Statute reads in pertinent part:

(1) A search warrant shall issue only on . . . facts sufficient to: (c) [e]stablish the grounds for issuance of the warrant or probable cause to believe that such grounds exist; and . . . (d) [e]stablish probable cause to believe that the property to be searched for, seized, or inspected is located at, in, or upon the premises, person, place, or thing to be searched. . . .

IOWA CODE § 16-3-303(1)(b),(d) (1992).

the designated location at the time of issue.¹¹⁵ In *Ex parte Oswald*,¹¹⁶ the Alabama Supreme Court reversed the Court of Criminal Appeals's broad ruling that "anticipatory search warrants are valid in Alabama."¹¹⁷ In dicta, the court broached Fourth Amendment questions in a preface, proclaiming that "we recognize, along with an overwhelming number of jurisdictions, that an anticipatory search warrant is not per se unconstitutional."¹¹⁸ The court's holding, however, was quite narrow: "The specific anticipatory search warrant at issue in this case was not authorized by existing Alabama law."¹¹⁹ The court noted the State's arguments that anticipatory warrants are permitted because not expressly prohibited by Alabama law,¹²⁰ and that the court should follow the trend of federal courts that permit such warrants under Federal Rule of Criminal Procedure 41.¹²¹ The court, however, confined its decision to the plain language of Rule 3.8 of the Alabama Rules of Criminal Procedure,¹²² and section 15-5-2 of the Alabama Code,¹²³ which required that the objects to be seized under a search warrant be evidence of a crime that had already occurred.¹²⁴ Rather than bend the rule, the court read it as it was written.

3. *The Court's Reasoning.*—In *Kostelec*, the Court of Appeals held that section 551(a) does not authorize search warrants when the supporting affidavit shows that the evidence to be seized is not currently

115. *Poirer*, 904 P.2d at 883.

116. 686 So. 2d 368 (Ala. 1996) (per curiam).

117. *Id.* at 372. The Alabama Court of Criminal Appeals held that "anticipatory search warrants do not violate the protections against unreasonable searches and seizures contained in the Fourth Amendment to the United States Constitution and the Alabama Constitution of 1901, Art. I, § 5 . . . [and] such warrants are valid under Alabama law controlling the issuance of search warrants." *Id.* at 369.

118. *Id.* at 369-70 (citation omitted).

119. *Id.* at 370.

120. *Id.* at 372.

121. *Id.*

122. Rule 3.8(3) reads in pertinent part:

A search warrant authorized by this rule may be issued if there is probable cause to believe that the property sought . . . (3) [i]s in the possession of any person with intent to use it as a means of committing a criminal offense, or is in the possession of another to whom he may have delivered it for the purpose of concealing it or preventing its discovery.

ALA. R. CRIM. P. 3.8(3) (1996).

123. Section 15-5-2(3) reads in pertinent part:

A search warrant may be issued on any one of the following grounds: . . . (3) [w]here it is in the possession of any person with the intent to use it as a means of committing a public offense or in the possession of another to whom he may have delivered it for the purpose of concealing it or preventing its discovery.

ALA. CODE § 15-5-2(3) (1996).

124. *Oswald*, 686 So. 2d at 373.

on the premises to be searched.¹²⁵ Though it granted certiorari to consider whether anticipatory search warrants are “constitutional and in compliance with Article 27, Section 551(a),”¹²⁶ the court based its decision on the construction of section 551(a) alone, explaining that it would not decide any constitutional question unless the record compelled it to do so.¹²⁷ In the first part of the decision, the court construed the language of section 551(a), explained its legislative intent, and concluded that it does not authorize anticipatory search warrants.¹²⁸ Second, the court explained that it would not decide the issue of the proper remedy for a violation of section 551(a) since that issue was not raised in a timely way.¹²⁹

The court’s analysis focused on the use of the present tense in the sentence of section 551(a) that describes the requirement to show probable cause to obtain a warrant.¹³⁰ It construed the statute’s language to mean that, at the time the judge is asked to rule, the crime “is being committed” and that the property “is situated or located” on the described premises.¹³¹ In so doing, the court reversed the Court of Special Appeals’s holding that section 551(a) requires only that probable cause be present at the time the warrant is issued, but that the evidence of crime may not be present until the time the warrant is executed.¹³²

Nevertheless, the Court of Appeals adopted the premise of the Court of Special Appeals—that the legislative intent in framing section 551(a) was never to address the protections of the Fourth Amendment.¹³³ Moreover, the Court of Appeals emphasized that the

125. *Kostelec*, 348 Md. at 236, 240, 703 A.2d at 163, 165.

126. *Id.* at 235, 703 A.2d at 163 (internal quotation marks omitted) (quoting the Court of Appeals’s order granting certiorari).

127. *Id.* at 236, 703 A.2d at 163.

128. *Id.* at 236-40, 703 A.2d at 163-65.

129. *Id.* at 240-43, 703 A.2d at 165-66. The court noted that the parties had neither argued the suppression issue to the courts below, nor raised it in a cross-petition for certiorari. *Id.* at 231-32, 703 A.2d at 161. Consequently, the court allowed that, in *Kostelec*’s case, the motion to suppress should be granted. *Id.* at 232, 703 A.2d at 161; *see also id.* at 242-43, 703 A.2d at 166 (concluding that “[i]nasmuch as § 551(a) was violated and there has been no previous challenge . . . to suppression as the remedy . . . the motion to suppress should be granted under the unique procedural history of this case”).

130. *Id.* at 236, 703 A.2d at 163. The court stated that “[t]he time to which the present tense of these verbs in § 551(a) refers is the time when the warrant is sought.” *Id.*

131. *Id.* (internal quotation marks omitted) (quoting MD. ANN. CODE art. 27, § 551(a) (1996)).

132. *Id.* at 235-36, 703 A.2d at 162-63.

133. *Id.* at 241-42, 703 A.2d at 165-66. Both courts look to *In re Special Investigation No. 228*, 54 Md. App. 149, 176-77, 685 A.2d 820, 834-35 (1983), which stated that “the federal Exclusionary Rule and the Maryland statute . . . are totally divergent remedies . . .”

language of section 551(a) was written in 1939, concluding that the “incompatibility” of this statute’s language with anticipatory warrants is explained by the simple fact that it was written “long before anticipatory warrants came into use.”¹³⁴ Instead, the language of section 551(a) belongs to the era of the “mere evidence rule,” which was abolished by the Supreme Court in *Hayden* in 1967.¹³⁵

For an explanation of how section 551(a) could function in the face of the new jurisprudence announced in *Hayden*, the court refers to a decision of the Court of Special Appeals, *Salmon v. State*.¹³⁶ In *Salmon*, Chief Judge Murphy wrote that section 551(a) “authorizes . . . a search of persons, places or things, as reasonably particularized in the warrant, for specifically designated property, unlawfully obtained or held, or of evidence of the commission of the crime, now including items relating thereto which are purely evidentiary in nature.”¹³⁷ Thus, whereas the state had been prohibited from seizing things in which the state could not show a superior property right prior to *Salmon*, the law now recognizes the public interest in permitting the seizure of material having evidentiary value in criminal prosecution.¹³⁸

Because the court was not reviewing the constitutionality of anticipatory search warrants, it disregarded the State’s long list of federal circuit and state cases upholding such warrants on Fourth Amendment grounds.¹³⁹ The court turned instead to three cases included as exceptions.¹⁴⁰ Decisions in Alabama, Colorado, and Iowa all construed the plain meaning of warrant statutes analogous to Maryland’s section 551(a) as requiring that the evidence be presently in the possession of the person whose premises are to be searched.¹⁴¹ Following

134. *Kostelec*, 348 Md. at 237, 703 A.2d at 163.

135. *Id.*; *Warden v. Hayden*, 387 U.S. 294, 310 (1967).

136. 2 Md. App. 513, 235 A.2d 758 (1967).

137. *Id.* at 519, 235 A.2d at 761.

138. See *supra* notes 96-97 and accompanying text (discussing the lack of an exclusionary remedy in the language of section 551(a)).

139. *Kostelec*, 348 Md. at 238, 703 A.2d at 164.

140. *Id.* The court found these cases to be more closely related to the issue under review. *Id.*

141. *Id.* at 238-40, 164-65; see *Ex Parte Oswalt*, 686 So. 2d 368, 370, 373 (Ala. 1996) (per curiam) (construing an Alabama Rule of Criminal Procedure authorizing search warrants as requiring the evidence to be “presently in the possession” of the person whose premises are to be searched); *People v. Poirez*, 904 P.2d 880, 883 (Colo. 1995) (en banc) (holding that the state’s statutory language precluded authorization of anticipatory search warrants); *State v. Gillespie*, 530 N.W.2d 446, 448-49 (Iowa 1995) (holding that “probable cause must exist at the time the warrant is issued” and therefore barring search warrants).

the reasoning in those decisions, the court held that section 551(a) did not authorize the disputed search warrant.¹⁴²

Next, the court explained its reason for declining to decide whether the proper remedy for a violation of section 551(a) was suppression of the evidence.¹⁴³ The State argued that section 551(a) does not include an exclusionary rule so that a violation of the statute that does not violate the Fourth Amendment should not result in evidence suppression.¹⁴⁴ However, the court ruled that the suppression issue had been introduced too late to receive consideration, as it had neither been argued in the lower courts nor raised in a cross-petition for certiorari in the Court of Appeals.¹⁴⁵

Nevertheless, the Court of Appeals commented that the lower court distinguished section 551(a) from the Fourth Amendment and provided authority to show that section 551(a) is not an exclusionary rule.¹⁴⁶ The court, however, pointed out the "unique procedural history" of the instant case:¹⁴⁷ *Both* the petitioner and the State had assumed that, if the warrant were found to violate section 551(a), the remedy would be suppression.¹⁴⁸ For this reason, in this instance, the court granted Kostelec's motion for suppression, while declining to rule on the proper remedy for violation of the statute generally.¹⁴⁹

4. *Analysis.*—

a. Judicial Restraint and the Problem of Maryland's Statutory Barrier to Anticipatory Search Warrants.—The *Kostelec* opinion, a model of judicial restraint, sends a clear message: state legislators—not courts—must decide the permissibility of anticipatory search warrants in Maryland. The terse ruling of the Court of Appeals says only "that

142. *Kostelec*, 348 Md. at 240, 703 A.2d at 165.

143. *Id.* at 240-41, 703 A.2d at 165.

144. *Id.* The State relied on *In re Special Investigation No. 228*, 54 Md. App. 149, 163, 458 A.2d 820, 827 (1983), which stated that the exclusionary rule would not apply to a violation of section 551(a). *Id.*; see also *Howell v. State*, 60 Md. App. 463, 469, 483 A.2d 780, 782 (1984) (rejecting an exclusionary remedy for violations of section 551(a)).

145. *Kostelec*, 348 Md. at 231-32, 703 A.2d at 161. The State's only argument in the circuit court was that the warrant was issued in good faith and, therefore, suppression should not be permitted under *United States v. Leon*, 468 U.S. 897, 923 (1984). *Kostelec*, 348 Md. at 241, 703 A.2d at 165.

146. *Kostelec*, 348 Md. at 241-42, 703 A.2d at 165-66 (citing *Anne Arundel County v. Chu*, 69 Md. App. 523, 528, 518 A.2d 733, 735 (1987)).

147. *Id.* at 243, 703 A.2d at 166.

148. *Id.*

149. *Id.* The court ordered that the conviction be vacated and the case be remanded for further proceedings consistent with its opinion.

§ 551(a) does not authorize anticipatory search warrants.”¹⁵⁰ In reversing the Court of Special Appeals, the Court of Appeals displayed judicial restraint in a manner which the lower court had not.

The *Kostelec* case raised a basic question: Are anticipatory warrants permissible in Maryland?¹⁵¹ The Court of Special Appeals explicitly addressed this question.¹⁵² In contrast, the Court of Appeals declined to answer this fundamental question, but instead confined itself solely to the question whether an anticipatory search warrant is “in compliance with Article 27, Section 551(a).”¹⁵³ The Court of Appeals does not deny the lower court’s observation that the case raised a fundamental question, but the court’s reserve implies that this is not a question for courts to answer. It is properly a question for the legislature.

While the two courts reached opposite results, they shared the same premise. The lower court held that “search warrants, merely because they are anticipatory, do not violate § 551(a) as a matter of law.”¹⁵⁴ In contrast, the higher court held “that § 551(a) does not authorize anticipatory search warrants.”¹⁵⁵ Yet both courts recognized that the statute neither prohibits nor authorizes these warrants for the same reason—it predates modern Fourth Amendment law and, therefore, simply does not address the issue of anticipatory warrants.¹⁵⁶ Given this premise, the Court of Special Appeals found the statute ambiguous and open to interpretation in light of legislative intent before reading it in *pari materia* with the Fourth Amendment.¹⁵⁷ The Court of Appeals, on the other hand, observed judicial restraint in reading the plain meaning of the statute.¹⁵⁸

The Court of Appeals also demonstrated judicial restraint in its refusal to rule on the issue of exclusion. While it emphatically declined to decide the issue because it has not been timely raised,¹⁵⁹ the court did devote half the opinion to explaining the issues surrounding the question of remedy.¹⁶⁰ The Court of Appeals identified the

150. *Id.* at 231, 703 A.2d at 161.

151. *See id.* at 235, 703 A.2d at 163; *Kostelec*, 112 Md. App. at 662, 685 A.2d at 1225.

152. *See Kostelec*, 112 Md. App. at 662, 685 A.2d at 1225.

153. *Kostelec*, 348 Md. at 235, 703 A.2d at 163. The Court formally posed the question of whether anticipatory warrants are constitutional, but declined to take it up because the record did not compel it. *Id.* at 236, 703 A.2d at 163.

154. *Kostelec*, 112 Md. App. at 670, 685 A.2d at 1229.

155. *Kostelec*, 348 Md. at 231, 703 A.2d at 161.

156. *Id.* at 237, 703 A.2d at 163; *see supra* note 133 and accompanying text.

157. *Kostelec*, 112 Md. App. at 669, 685 A.2d at 1229.

158. *See Kostelec*, 348 Md. at 236, 703 A.2d at 163.

159. *Id.* at 240-43, 703 A.2d at 165-66.

160. *See id.*

strongest authorities for the position that exclusion is unavailable under section 551(a).¹⁶¹ However, because the State had not raised this issue, the court did not decide it.¹⁶² The Court of Appeals consistently exhibited judicial restraint by refusing to do the work of the legislature. Likewise, the court declined to do the work of the prosecutor, granting Kostelec's motion for suppression in the absence of timely opposition: "[i]nasmuch as § 551(a) was violated and there has been no previous challenge to Kostelec's assertion of a right to suppression as the remedy for that violation, the motion to suppress should be granted under the unique procedural history of this case."¹⁶³

b. Judicial Restraint as a Call for Legislative Action.—In exercising judicial restraint, the Court of Appeals focused solely on how section 551(a) should be read.¹⁶⁴ Thus, it did not consider the long line of federal circuit court and state cases holding that anticipatory warrants do not violate the Fourth Amendment.¹⁶⁵ Instead, the court turned immediately to the decisions of three states in which statutes analogous to section 551(a) have been construed to reach the same result.¹⁶⁶ It is illuminative to ask how and why these three states ruled as they did in order to interpret the similar decision in *Kostelec*. The comparison with *Kostelec* provides support for the view that courts faced with outdated search and seizure statutes should observe judicial restraint in applying the statutes, with the expectation that the permissibility of anticipatory warrants will be determined by their state legislatures through deliberate revision of the law.

161. See *id.* at 240, 703 A.2d at 165. The State took the position that "§ 551(a) does not embody an exclusionary rule." *Id.*; see *supra* note 144 and accompanying text (discussing authorities that have held that the exclusionary rule does not apply to a violation of section 551(a)).

162. *Kostelec*, 348 Md. at 242-43, 703 A.2d at 166.

163. *Id.* at 243, 703 A.2d at 166 (citation omitted).

164. See *id.* at 236-37, 703 A.2d at 163.

165. *Id.* at 238, 703 A.2d at 164 (referring to, but neither citing nor discussing, cases from "ten federal circuit courts of appeal and from numerous state courts" cited by the State that conclude that anticipatory search warrants are constitutional under the Fourth Amendment); see *supra* note 25 (providing federal and state court decisions upholding anticipatory warrants).

166. *Kostelec*, 348 Md. at 238-40, 703 A.2d at 164-65; see *Ex parte Oswalt*, 686 So. 2d 368, 370 (Ala. 1996) (per curiam) ("[T]he specific anticipatory search warrant at issue in this case was not authorized by existing Alabama law."); *People v. Poirez*, 904 P.2d 880, 883 (Colo. 1995) (en banc) ("[T]he language of section 16-3-303, 8A C.R.S. (1986), creates a barrier to the issuance of anticipatory warrants by judicial officers."); *State v. Gillespie*, 530 N.W.2d 446, 449 (Iowa 1995) (holding that because the disputed warrant's conditions "were not established facts at the time the search warrant was issued . . . [it] was invalid").

These Alabama, Colorado, and Iowa cases can be compared to the *Kostelec* decision on three main points: first, all three courts exercised judicial restraint, as Maryland did, to apply the statutes literally;¹⁶⁷ second, Colorado and Alabama acted, as Maryland did, on the express premise that their warrant statutes predate Fourth Amendment jurisprudence;¹⁶⁸ and third, none of the three states heard the argument that suppression is unavailable to remedy statutory violations, and, in contrast to the Maryland opinion, none identified suppression as an issue.¹⁶⁹

c. Interpreting Statutes That Antedate Modern Fourth Amendment Jurisprudence.—Colorado and Alabama acknowledged that their warrant statutes antedated the modern Fourth Amendment jurisprudence to which anticipatory warrants belong¹⁷⁰—a premise subsequently accepted in Maryland.¹⁷¹ The Colorado court based its reading of its warrant statute on the fact that the statute had been bypassed by modern Fourth Amendment law through adoption of Federal Rule of Criminal Procedure 41.¹⁷² The court looked to Rule 41(a) of the Federal Rules of Criminal Procedure,¹⁷³ which was amended in 1990 to permit anticipatory search warrants.¹⁷⁴ The 1990 advisory committee note explained the revision:

167. See *Oswalt*, 686 So. 2d at 373 (reasoning on the basis of plain language interpretation of legislative intent); *Gillespie*, 530 N.W.2d at 448-49 (same); *Poirez*, 904 P.2d at 882-83 (same).

168. See *Poirez*, 904 P.2d at 882-83 (comparing the language of Colorado's warrant statute to similar language that was deleted from Federal Rule of Criminal Procedure 41(a) in order "to make way for anticipatory warrants"); *Oswalt*, 686 So. 2d at 373-74 (recommending that Alabama's Rules Advisory Committee "redraft Rule 3.8 to permit the broader issuance of anticipatory search warrants than the [r]ule currently allows").

169. See *Oswalt*, 686 So. 2d at 368; *Poirez*, 904 P.2d at 880; *Gillespie*, 530 N.W.2d at 446.

170. See *Oswalt*, 686 So. 2d at 373-74 (pointing out that "although anticipatory search warrants may be constitutional," the original intent of Alabama's warrant statute did not recognize their permissibility); *Poirez*, 904 P.2d at 883 (observing that Colorado's statute contains language identical to FED. R. CRIM. P. 41(a) before that rule was modernized).

171. *Kostelec*, 348 Md. at 237, 703 A.2d at 163 (recognizing that "[t]he incompatibility of the language of § 551(a) with anticipatory warrants is explained by the fact that the language under consideration formed part of the statute's original enactment . . . long before anticipatory warrants came into use").

172. *Poirez*, 904 P.2d at 882-83.

173. See FED. R. CRIM. P. 41(a) (1998). The rule provides:

Upon the request of a federal law enforcement officer . . . , a search warrant authorized by this rule may be issued . . . for a search of property or for a person within the district and . . . for a search of property or for a person either within or outside the district if the property or person is within the district when the warrant is sought but might move outside the district before the warrant is executed.

Id.

174. *Poirez*, 904 P.2d at 883.

"Rule 41(a)(1) permits anticipatory warrants by omitting the words 'is located,' which in the past required that in all instances the object of the search had to be located within the district at the time the warrant was issued. Now a search for property or a person within the district, or expected to be within the district, is valid if it otherwise complies with the rule."¹⁷⁵

The Colorado court noted that its own statute retained the outdated language barring the authorization of anticipatory search warrants.¹⁷⁶ The court's own explanation strongly suggests that Colorado's statute should be revised in the same way that the federal rules have been:

*We cannot overlook the direction charted by the amendment to Fed. R. Crim. P. 41. Language identical in pertinent part to our statute was deleted so as to make way for anticipatory warrants because such language was viewed as requiring probable cause to believe the object of the search was located at the place to be searched contemporaneous with issuance.*¹⁷⁷

Moreover, by supporting its holding with an analysis of the Federal Rules of Criminal Procedure, the court implied that the state rules should be made to conform to the modern jurisprudence accepting anticipatory warrants.¹⁷⁸

The Alabama Supreme Court asserted even more clearly that the old rules and statutes that impede modern search and seizure jurisprudence should be revised to permit anticipatory warrants.¹⁷⁹ The Alabama court found "no indication of an intent when Rule 3.8 was adopted to expand the grounds for granting a search warrant beyond those that were provided for in § 15-5-2 and its ancient predecessors."¹⁸⁰ Hence, the court observed restraint by applying an outdated law instead of making it comply with the times. According to the court:

although anticipatory search warrants may be constitutional, those which fail to comply with the requirements adopted by this Court in Rule 3.8 are currently impermissible in Alabama. *However, because we believe it would be in the best interest of the citizens of this State, we recommend that the Criminal Rules Ad-*

175. *Id.* (quoting FED. R. CRIM. P. 41(a) Advisory Committee's Note (1990)).

176. *Id.*

177. *Id.* (emphasis added).

178. *Id.*

179. *Ex parte Oswald*, 686 So. 2d 368, 374 (Ala. 1996) (per curiam).

180. *Id.* at 373.

*visory Committee redraft Rule 3.8 to permit the broader issuance of anticipatory search warrants than the Rule currently allows.*¹⁸¹

The Alabama court's restraint represented a call to the legislature's rules committee to take action.¹⁸² The court analyzed Rule 41(a) in order to support its reading of the present tense language of the state's rule and statute.¹⁸³

d. Anticipating Statutory Reform of Search and Seizure Law.—

The clear message of the *Kostelec* decision was recognized by Maryland State Delegates Rosenberg and Genn who, in February 1998, introduced Maryland House Bill 706, which proposed the repeal and reenactment with amendments of Article 27, section 551.¹⁸⁴ While the bill failed in the judiciary committee, the failure does not represent a conclusive judgment on anticipatory warrants because the proposed bill also included a provision for oral warrants.¹⁸⁵ The proposal for anticipatory warrants will likely find greater success if reviewed on its own merits.

The Maryland initiative on anticipatory warrants accorded with the intention of *Kostelec*, and followed the direction of the Colorado and Alabama decisions. Alabama has already changed its rules to permit anticipatory warrants and the legislature is reading a bill to revise the relevant statute.¹⁸⁶ Other states in which statutory change author-

181. *Id.* at 374.

182. *See id.* This call echoed the Illinois Supreme Court's suggestion to the legislature in *People v. Ross*, 659 N.E.2d 1319, 1321-22 (Ill. 1995). In *Ross*, the court invited the legislature to rewrite the existing statute to recognize anticipatory search warrants. *Ross*, 659 N.E.2d at 1321-22; *see also* *People v. Ross*, 642 N.E.2d 914, 917-18 (Ill. App. Ct. 1994) (holding that anticipatory warrants are impermissible under Illinois's statute, but that "[i]f Illinois wishes to overcome this limitation and join those jurisdictions presently benefiting from the use of anticipatory search warrants, the remedy must come from legislative modification of the existing statutory scheme[; w]e strongly suggest that the legislature review section 108.3 to determine if amendment is appropriate").

183. *See Oswald*, 686 So. 2d at 374.

184. Md. H.B. 706, Reg. Sess. (Md. 1998). The bill proposed to add the following future-tense language to the warrant requirement of probable cause: "there is probable cause . . . to believe that any misdemeanor or felony is being committed *or will be committed* . . . or that any property subject to seizure under the criminal laws of the State is situated or located *or will be situated or located*." *Id.*

185. *Id.*

186. *See* ALA. R. CRIM. P. 3.8 (1998) (amended 1997). Amendments to the Alabama Rules of Criminal Procedure 3.8 permitting anticipatory search warrants were adopted by the Alabama Legislature and became effective December 1, 1997. *Id.* Subsequently, 1998 Alabama Senate Bill No. 150 was introduced to revise the corresponding statute. S.B. 150, Reg. Sess. (Ala. 1998).

izing anticipatory warrants has been proposed in the past year include Hawaii¹⁸⁷ and Rhode Island.¹⁸⁸

Anticipatory warrants have met the needs of law enforcement primarily in the effort to control problems posed by the trade in drugs and in child pornography.¹⁸⁹ Increasingly, circumstances occur in which anticipatory warrants prove indispensable. For example, for police stings in which undercover agents are sent into drug trafficking operations in anticipation of making arrests, anticipatory warrants are the most effective law enforcement tool.¹⁹⁰ Furthermore, anticipatory warrants allow police to preserve easily destroyed evidence by entering the suspect's premises without seeking consent.¹⁹¹ Narcotics can be disposed of by being flushed down the toilet or poured down the drain; likewise, child pornography on computers or disks can be erased by the push of a button or the brush of a magnet. Finally, the only way to curtail child pornography that is sent and received over the Internet instead of being delivered to the home by mail or courier may be an anticipatory warrant.

Legal scholars have pointed out that anticipatory warrants ensure greater protection of privacy by providing judicial oversight of police searches.¹⁹² Without anticipatory warrants police will have to conduct warrantless searches, rely on exceptions to the warrant requirement,

187. See S.B. 2710, 19th Leg., Reg. Sess. (Haw. 1997) (amended 1998). 1997 Hawaii Senate Bill No. 2710 reads in pertinent part:

The legislature recognizes the tremendous importance and utility of anticipatory search warrants in drug investigations The legislature finds that the Hawaii supreme court has held that anticipatory search warrants are impermissible under section 803-31, Hawaii Revised Statutes The legislature further finds that the court stated that it was "incumbent upon the legislature to amend HRS Section 803-31 to provide a legal basis" for anticipatory search warrants.

Accordingly, the purpose of this Act is statutorily to authorize the issuance of anticipatory search warrants.

Id.

188. See S.B. 2844, 1997-98 Leg. Sess. (R.I. 1998). 1997 Rhode Island Senate Bill No. 2844 proposed revision of the existing warrant statute to provide for anticipatory warrants and telephonic application for search warrants and anticipatory warrants. *Id.*

189. See *supra* note 83 and accompanying text (discussing decisions involving drug trafficking and child pornography in which anticipatory warrants have been upheld).

190. See *Mincey v. Arizona*, 437 U.S. 385, 390 (1978) (repudiating the "murder scene exception" for warrantless search in the absence of exigency when police searched the suspects' premises after an undercover police agent was killed in a shootout with drug traffickers).

191. See *Schmerber v. California*, 384 U.S. 757, 770-72 (1966) (upholding the exception to the warrant rule for searches necessary and reasonable to preserve evidence under the totality of the circumstances).

192. 2 WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT 362 (3d ed. 1996).

and risk exclusion of the evidence at trial.¹⁹³ In so doing, law enforcement bears the burden of showing that the warrantless search was necessitated by exigency and justified by the totality of the circumstances.¹⁹⁴ For the police officers on the streets, therefore, the court's view of a particular search remains unpredictable. Moreover, as Judge Kearsse has argued convincingly, even if a warrantless search meets muster as exigent, the expedient of exigent circumstances remains constitutionally problematic.¹⁹⁵ According to Kearsse, the *MacDonald* court's decision to permit warrantless searches for exigency on the totality of the circumstances defeats the Fourth Amendment in two ways.¹⁹⁶ It both renders probable cause tantamount to exigency and encourages police to contrive exigency in order to circumvent the Fourth Amendment.¹⁹⁷

Vice's infinite variety makes it difficult to generalize about how law enforcement should proceed while anticipatory warrants remain unavailable. In the *Kostelec* case, however, it is clear that a warrantless search could not have been justified as exigent.¹⁹⁸ In contrast to the police drug raid in *MacDonald*, in *Kostelec*, police did not peaceably announce themselves before entering the Kostelec residence.¹⁹⁹ Under the facts of *Kostelec*, police without an anticipatory warrant would have been forced to follow a circuitous path and to invoke yet another warrant clause exception. Instead of seeking to charge suspects with distribution or possession of narcotics, police could have pursued conspiracy charges.²⁰⁰ To seize evidence, police would have had to rely not on search warrants, but on arrest warrants, and expect

193. See *Johnson v. United States*, 333 U.S. 10, 14 (1948) (establishing the per se warrant rule for searches).

194. See *Dorman v. United States*, 435 F.2d 385, 392-93 (1970) (en banc) (establishing six factors relevant to determining the existence of an exigency); see also *United States v. MacDonald*, 916 F.2d 766, 769-70 (2d Cir. 1990) (adopting and applying the *Dorman* factors to a warrantless search). The *Dorman* factors include the gravity of the offense, a reasonable belief that the suspect is armed, a clear showing of probable cause, a strong reason to believe that the suspect is present on the premises, likelihood of escape, and peaceful circumstances of entry. *Dorman*, 435 F.2d at 392-93.

195. *MacDonald*, 916 F.2d at 777 (Kearsse, J., dissenting) (arguing that "[a]fter this decision there appears to be little left of the warrant requirement in narcotics cases").

196. *Id.* at 776-77.

197. *Id.* For example, police may do this by the pretext of identifying and announcing themselves before breaking in. *Id.*

198. See *Kostelec*, 348 Md. at 232-34, 703 A.2d at 161-62.

199. *Id.* at 234, 703 A.2d at 162; *MacDonald*, 916 F.2d at 768.

200. See MD. CODE ANN. art. 27, § 286 (1996). Conspiracy carries the same maximum penalties as the actual crime. For narcotics offenses, the same sentencing guidelines apply to conspiracy crimes as well. MD. CODE ANN. art. 27, § 38 (1996).

to search incident to arrest.²⁰¹ An arrest on conspiracy charges could then lead to further charges of possession and intent to distribute. This course recalls the old Polonius who would "[b]y indirections find directions out."²⁰²

e. Judicial Acceptance of the Constitutionality of Anticipatory Warrants.—The question of the constitutionality of anticipatory warrants, easily decided by the Court of Special Appeals,²⁰³ was not reached by the Court of Appeals in *Kostelec*.²⁰⁴ The strongest indication that anticipatory warrants are constitutionally valid comes from the Supreme Court itself. Although the Court has not formally ruled on anticipatory warrants in any opinion, Congress has revised Federal Rule of Criminal Procedure 41(a) to permit anticipatory warrants.²⁰⁵ Moreover, a growing number of federal and state courts have decided that anticipatory search warrants are valid.²⁰⁶

Congress's revision of Rule 41(a) strongly suggests that anticipatory warrants are constitutionally valid. Prior to the change, the rule stated that a search warrant may be issued by a judicial officer "within the district wherein the property or person sought is located."²⁰⁷ The revised Rule 41(a) omits the words "is located," to permit anticipatory search warrants that otherwise comply with the rule.²⁰⁸

Numerous federal and state courts have justified anticipatory warrants on the grounds that anticipatory search warrants comply with the Fourth Amendment as reasonable or that they are preferable to warrantless searches.²⁰⁹ In *United States v. Gendron*,²¹⁰ Chief Judge Breyer, formerly of the United States Court of Appeals for the First

201. See *Draper v. U.S.*, 358 U.S. 307, 314 (1959) (concluding that a search made incident to a lawful arrest was valid).

202. WILLIAM SHAKESPEARE, *HAMLET*, act 2, sc. 1.

203. *Kostelec*, 112 Md. App. at 668, 685 A.2d at 1228.

204. *Kostelec*, 348 Md. at 236, 703 A.2d at 163.

205. See *supra* notes 173-175 and accompanying text (quoting the notes of the 1990 Rules Advisory Committee explaining the change in Rule 41(a) and the effect of permitting anticipatory search warrants).

206. See *supra* note 25 (cataloging federal and state court decisions upholding the constitutionality of anticipatory search warrants).

207. See *People v. Poirez*, 904 P.2d 880, 882 (Colo. 1995) (en banc) (quoting FED. R. CRIM. P. 41(a) (1976)).

208. See FED. R. CRIM. P. 41(a).

209. See, e.g., *United States v. Gendron*, 18 F.3d 955, 965 (1st Cir. 1994) ("There is nothing unreasonable about authorizing a search for tomorrow, not today . . ."); *United States v. Garcia*, 882 F.2d 699, 703 (2d Cir. 1989) ("[T]he purposes of the fourth amendment are best served by permitting government agents to obtain warrants in advance . . .").

210. 18 F.3d 955 (1st Cir. 1994).

Circuit, defined the basic reason for the constitutional validity of anticipatory search warrants:

[i]n principle, the use of a “triggering event” can help assure that the search takes place *only* when justified by “probable cause”; and anticipatory warrants may thereby offer greater, not lesser, protection against unreasonable invasion of a citizen’s privacy.²¹¹

Chief Judge Breyer explained that anticipatory warrants satisfy the reasonableness clause of the Fourth Amendment:

[w]arrants often do specify that they will take effect upon issuance. But the Constitution imposes no such requirement. Rather, it says that a search must not be “unreasonable,” and that warrants must be supported by “probable cause.” U.S. Const. amend. IV. There is nothing unreasonable about authorizing a search for tomorrow, not today, when reliable information indicates that, say, the marijuana will reach the house, not now, but then. Nor does it seem automatically unreasonable to tie the warrant’s search authority to the future event that brings with it the probable cause. . . .²¹²

The court in *United States v. Garcia*²¹³ defended the constitutionality of anticipatory warrants on the grounds that they are preferable to warrantless searches:

[t]he question . . . is whether the objective of the fourth amendment is better served by allowing an agent to obtain a warrant in advance of delivery, or whether it is better served by forcing him to go to the scene without a warrant, and, if necessary, proceed under the constraints of the “exigent circumstances” exception, subject always to the risk of “being second-guessed” by judicial authorities at a later date as to whether the known facts legally justified the search.²¹⁴

Furthermore, the *Garcia* court argued that anticipatory searches protect Fourth Amendment rights: “[a]nticipatory warrants are not unconstitutional per se, and in the proper circumstances, may be an effective tool, both to fight criminal activity, and to protect individual fourth amendment rights.”²¹⁵ Courts, therefore, have upheld antici-

211. *Id.* at 965.

212. *Id.*

213. 882 F.2d 699 (2d Cir. 1989).

214. *Id.* at 703 (citation omitted).

215. *Id.*

patory warrants under the Fourth Amendment both as reasonable and as offering the supervision of a judicial officer.

5. *Conclusion.*—The *Kostelec* decision places Maryland in anticipation of anticipatory warrants. Maryland's statutory barrier to anticipatory warrants remains until the legislature—not the court—removes it. The court held that section 551(a) does not authorize such warrants.²¹⁶ In so doing, the court recognized that in fifty years since the statute's enactment, modern search and seizure jurisprudence has recast search and seizure law. Nevertheless, the court duly applied the statute in a tacit call for the legislature to consider whether Maryland will approve anticipatory warrants.²¹⁷ Furthermore, the court declined to decide whether suppression is a remedy for a violation of this statute.²¹⁸ The *Kostelec* court's judicial restraint in applying section 551(a) suggests that it has not reserved judgment on the appropriateness of revising Maryland law to permit anticipatory warrants.

M. AHMAD A. BAIG*

B. Prosecutorial Discretion and Mandatory Minimum Sentences

In *Beverly v. State*,²¹⁹ the Court of Appeals correctly held that a trial court is not compelled to invoke a mandatory minimum sentence pursuant to a subsequent offender statute²²⁰ where the defendant is a subsequent offender, but the State had agreed in a plea-bargain not to treat the crime as a subsequent offense.²²¹ The court reached this

216. *Kostelec*, 348 Md. at 231, 703 A.2d at 161.

217. *See id.* at 236-37, 703 A.2d at 163.

218. *Id.* at 240-41, 703 A.2d at 165.

* The author wishes to acknowledge suggestions and contributions of Professors Richard Boldt, Alan Hornstein, and Jerome Deise. In addition, Alan Woods, Chief of the Research and Development Division of the State's Attorney's Office for Baltimore City, gave the benefit of his experience and insight.

219. 349 Md. 106, 707 A.2d 91 (1998).

220. The criminal statute at issue in this case provided in pertinent part:

A person who is convicted under subsection (b)(1) or subsection (b)(2) of this section [concerning distribution and possession of controlled substances], or of conspiracy to violate subsection (b)(1) or (b)(2) of this section shall be sentenced to imprisonment for not less than 10 years if the person previously has been convicted: (i) Under subsection (b)(1) or subsection (b)(2) of this section; (ii) Of conspiracy to violate subsection (b)(1) or subsection (b)(2) of this section; or (iii) Of an offense under the laws of another state, the District of Columbia, or the United States that would be a violation of subsection (b)(1) or subsection (b)(2) of this section if committed in this State.

MD. ANN. CODE art. 27, § 286(c)(1) (1996).

221. *Beverly*, 349 Md. at 126-27, 707 A.2d at 101.

holding by deferring to a prosecutor's discretion under Maryland Rule 4-245(c),²²² which, on the court's reading, allows the prosecutor not to treat the defendant's crime as a subsequent offense either by not giving the defendant notice of the State's intent to use his prior convictions to invoke the mandatory minimum sentence, or by withdrawing this notice after it has been given.²²³ In so doing, the court followed well-established case law, which supports broad discretion for the State's Attorney to decide which cases to prosecute.²²⁴ The court also considered the withdrawal of notice as a special form of plea bargaining known as charge bargaining, which the trial judge has no authority to reject.²²⁵ The dissent argued that such a practice "thwart[s]" the legislature's intent to punish repeat drug offenders more severely.²²⁶ If the General Assembly wanted to prevent the practice of plea bargaining "around" mandatory minimum penalties, however, it could pass a statute limiting prosecutorial discretion; indeed, a model for such a statute already exists in Kansas, which has limited the ability of prosecutors to plea-bargain in repeat offender drunk-driving cases.²²⁷ Thus, because the practice of plea bargaining "around" mandatory minimum sentences need not undermine the legislature's intent to punish repeat drug offenders more seriously than first time offenders, the court correctly decided that the prosecutor has the discretion to decide which cases to prosecute.

1. *The Case.*—Victor Tyrone Beverly was charged under Article 27, section 286, with twelve counts of drug-related offenses, including possession of dangerous controlled substances with intent to distribute.²²⁸ Beverly had previously violated and been convicted under the same criminal statutory provisions.²²⁹ Subsection (c) of section 286 provides that, "A person who is convicted under subsection (b) (1) or subsection (b) (2) of this section . . . shall be sentenced to imprisonment for not less than 10 years if the person previously has been convicted: (i) Under subsection (b)(1) or subsection (b)(2) of this

222. MD. RULE 4-245(c). For the text of this Rule, see *infra* note 13.

223. *Beverly*, 349 Md. at 126-27, 707 A.2d at 101.

224. *Id.* at 121, 707 A.2d at 98 (citing *Ewell v. State*, 207 Md. 288, 296, 114 A.2d 66, 71 (1955); *Brack v. Wells*, 184 Md. 86, 90, 40 A.2d 319, 321 (1944)).

225. *Id.* at 127, 707 A.2d at 101.

226. *Id.* at 130, 707 A.2d at 102-03 (Wilner, J., dissenting).

227. See KAN. STAT. ANN. § 8-1567(n) (1991) (prohibiting plea bargaining in repeat offender drunk-driving cases); *State v. Compton*, 664 P.2d 1370, 1376-79 (Kan. 1983) (upholding, under a separation of powers challenge, the constitutionality of this statute).

228. *Beverly*, 349 Md. at 110, 707 A.2d at 93.

229. *Id.*

section”²³⁰ Pursuant to Maryland Rule 4-245, which sets forth the procedural requirements for invoking enhanced penalties, the State notified Beverly of its decision to invoke the mandatory penalty authorized by section 286(c).²³¹

Before trial, the State and the defendant reached a plea agreement in which the State offered a sentencing cap of ten years with the possibility of parole.²³² That is, the State was offering to withdraw its subsequent offender notice in exchange for Beverly’s guilty plea.²³³ As a result of this plea agreement, both the State’s Attorney and Beverly expected his sentence to be less than the mandatory minimum sentence that the State originally sought under section 286(c).²³⁴

Before accepting this agreement, the trial court judge looked to the language of section 286(c) to determine if she had the authority to sentence the defendant to less than the mandatory minimum.²³⁵ The trial judge found no language in the statute that referred to plea bargaining or that permitted a sentence of less than ten years without parole under the circumstances of this case.²³⁶ The trial judge concluded that section 286(c) required that a ten-year sentence be imposed and that she had no authority to sentence the defendant to a lesser punishment than what the statute required.²³⁷

230. MD. ANN. CODE art. 27, § 286(c) (1996). Subsection (c) also imposes a ten-year mandatory minimum penalty for those who are convicted of conspiracy to violate subsection (b)(1) or subsection (b)(2). *Id.*

231. *Beverly*, 349 Md. at 111, 707 A.2d at 93. Maryland Rule 4-245 states in pertinent part:

(c) *Required notice of mandatory penalties.* When the law prescribes a mandatory sentence because of a specified previous conviction, the State’s attorney shall serve a notice of the alleged prior conviction on the defendant or counsel at least 15 days before sentencing in circuit court or five days before sentencing in District Court. If the State’s Attorney fails to give timely notice, the court shall postpone sentencing at least 15 days unless the defendant waives the notice requirement.

MD. RULE 4-245(c).

232. *Beverly*, 349 Md. at 111, 707 A.2d at 93.

233. *Id.*

234. *Id.*

235. *Id.* at 111-12, 707 A.2d 93-94.

236. *Id.* Section 286(c)(2) provides a limited exception to the mandatory ten-year penalty by stating that “the person may be paroled during [the ten year] period only in accordance with Article 31B, § 11 of the Code.” MD. ANN. CODE art. 27, § 286(c)(2) (1996). This limited exception applies to inmates who are serving their sentence at the Patuxent Institution, which houses inmates with an “intellectual impairment or emotional unbalance.” *See* MD. ANN. CODE art. 31B, § 11 (1997) (discussing conditions of release from the Patuxent Institution). Subsection 286(c)(2) also states that “[t]he prison sentence of . . . a second offender may not be suspended to less than 10 years.” MD. ANN. CODE art. 27, § 286(c)(2).

237. *Beverly*, 349 Md. at 112-14, 707 A.2d at 93-95.

The prosecution then directed the judge's attention to Maryland Rule 4-245, hoping that it would provide some guidance.²³⁸ The judge read Maryland Rule 4-245 in the context of the mandatory penalties required in section 286(c) and concluded that the Rule requires a postponement of the sentencing hearing for fifteen days if the defendant has not been notified of his status as a repeat offender.²³⁹ Finding no authority in Maryland Rule 4-245 to sentence the defendant to less than the mandatory sentence prescribed by section 286(c), the trial judge became convinced that the statute commanded her to hand down the prescribed sentence.²⁴⁰

After failing to persuade the trial judge through examination of the statute and the rule that the State could waive the mandatory minimum sentence, the State's Attorney pointed out that withdrawing the notice of mandatory penalties was a common practice.²⁴¹ The court rejected this argument, stating that the legislature's intent in enacting section 286(c) was "to facilitate the imposition of mandatory sentences."²⁴² Furthermore, the statute and the rule offered no suggestion that the court had the discretion to decide whether or not to impose the mandatory sentence.²⁴³ As a result, the trial judge rejected the plea agreement.²⁴⁴

Because the plea agreement was not approved, the defendant decided to plead not guilty and proceeded to trial.²⁴⁵ The jury returned a guilty verdict on all counts, and the State invoked the ten-year mandatory penalty prescribed by section 286(c). The court subsequently sentenced Beverly to fifteen years in prison, ten of those years to be served without parole. Although Beverly renewed his objection at the sentencing hearing to the trial court's refusal to allow the prosecutor to withdraw the subsequent offender notice, the trial court reaffirmed its position that it was required to impose the mandatory sentence.²⁴⁶

On appeal to the Court of Special Appeals, all parties agreed that they had indeed reached a pretrial plea-bargain in which the State agreed to withdraw its notice to seek mandatory penalties.²⁴⁷ Before

238. *Id.* at 112, 707 A.2d at 94.

239. *Id.*

240. *Id.* at 112-14, 707 A.2d at 94-95.

241. *Id.* at 113, 707 A.2d at 94.

242. *Id.*

243. *Id.* at 114, 707 A.2d at 94.

244. *Id.*, 707 A.2d at 95.

245. *Id.*

246. *Id.*

247. *Id.* at 116, 707 A.2d at 96.

this court heard the appeal, the Court of Appeals granted certiorari on its own motion to hear the case.²⁴⁸

2. *Legal Background.*—

a. History of Prosecutorial Discretion in Maryland.—In Maryland, the decision whether a prosecutor will pursue a plea agreement with a defendant has been largely a matter of prosecutorial discretion.²⁴⁹ The Court of Appeals recognized this discretionary function of the prosecutor in *Brack v. Wells*.²⁵⁰ In this case, the appellant, Brack, filed a petition for a writ of mandamus.²⁵¹ Brack claimed that a party who previously brought a lawsuit against him held a signed assurance that, if the case were not successful, then that party would not be required to pay any legal fees.²⁵² In addition, Brack asserted that this lawsuit was instituted in an attempt to defraud him of money and property.²⁵³ He claimed that these practices violated a statute prohibiting barratry.²⁵⁴ The petitioner repeatedly had presented his allegations to the State's Attorney for Baltimore City, who refused to institute criminal charges against the party who had sued Brack.²⁵⁵ Arguing that this refusal to prosecute violated the prosecutor's oath of office and his duty to uphold justice in the State, Brack sought a writ of mandamus to compel the State's Attorney to enforce the statute.²⁵⁶

248. *Id.*

249. Maryland is not alone in its support for prosecutorial discretion. The District of Columbia has followed similar reasoning in addressing the prosecutor's discretion to institute a criminal action and the limited authority given to courts to check that discretionary function. See *United States v. White*, 689 A.2d 535, 538 (D.C. 1997) (pointing out that normally "the judiciary is without authority to question and review the Executive Branch in the exercise of its discretion in deciding whether or not to prosecute a particular case"); *Wood v. United States*, 622 A.2d 67, 70 (D.C. 1993) (suggesting that the judiciary is ill-suited to question the broad discretion possessed by the prosecutor to bring a criminal action because factors such as "the strength of the case, the prosecution's general deterrence value, the [g]overnment's enforcement priorities, and the case's relationship to the [g]overnment's overall enforcement plan are not readily susceptible to the kind of analysis the courts are competent to undertake" (internal quotation marks omitted) (alterations in original) (quoting *Fedorov v. United States*, 600 A.2d 370, 376 (D.C. 1991) (en banc))).

250. 184 Md. 86, 40 A.2d 319 (1944).

251. *Id.* at 88, 40 A.2d at 320. Brack sought the writ of mandamus to order the State's Attorney to present evidence of barratry in a previous case in which he had been a litigant to the grand jury of Baltimore City. *Id.* at 89, 40 A.2d at 320.

252. *Id.* at 88-89, 40 A.2d at 320.

253. *Id.* at 89, 40 A.2d at 320.

254. *Id.* at 88-89, 40 A.2d at 320 (citing MD. ANN. CODE art. 27, §§ 14, 15 (1939)). Section 14 defined barratry as the situation in which someone "having no existing relationship or interest in the issue . . . solicits another to sue."

255. *Brack*, 184 Md. at 89, 40 A.2d at 320.

256. *Id.* at 88-89, 40 A.2d at 320.

The Court of Appeals rejected this argument, finding that, as a general rule, the prosecutor's decision whether to pursue a particular case "is a matter which rests in [the State's Attorney's] discretion."²⁵⁷ The court stated that a writ of mandamus will not be granted unless the prosecutor grossly abuses his discretion, or a statute imposes a duty to prosecute.²⁵⁸ The court based this rule on the duty imposed on the State's Attorney by the Constitution of Maryland, which provided that "the State's Attorney shall perform such duties as may by law be prescribed."²⁵⁹ The court also examined a statutory provision requiring the prosecutor to "prosecute and defend, on the part of the State, all cases in which the State may be interested."²⁶⁰ In light of these provisions, the court concluded that a prosecutor "must be trusted with broad official discretion to institute and prosecute criminal causes."²⁶¹

The United States District Court for the District of Maryland followed *Brack* in interpreting Maryland state law in *Sellner v. Panagoulis*.²⁶² Sellner was a retired police officer who conducted a freelance investigation of an unsolved murder in the county where he served on the police force.²⁶³ During the course of his investigation, Sellner became convinced that he had identified the prime suspect in connection with the murder.²⁶⁴ The petitioner presented his findings to the State's Attorney, but claimed that the prosecutor chose not to prosecute the case because the prosecutor was part of a wider conspiracy to cover up the murder.²⁶⁵ Sellner claimed that the State's Attorney's decision not to pursue the case was a denial of his right to the courts.²⁶⁶ Following *Brack*, the district court held that in Maryland there is "no such duty [to aid a grand jury in its consideration of evidence presented by an individual] in cases in which the State's Attor-

257. *Id.* at 90, 40 A.2d at 321.

258. *Id.*

259. *Id.* For the current version of the constitutional provision at issue in *Brack*, see MD. CONST. art. V, § 9.

260. *Id.* (internal quotation marks omitted) (citing MD. ANN. CODE art. 10, § 33 (1939)). The section referred to by the court in *Brack* is now located in a different part of the Code. See MD. ANN. CODE art. 10, § 34 (1998).

261. *Brack*, 184 Md. at 90, 40 A.2d at 321.

262. 565 F. Supp. 238 (D. Md. 1982), *aff'd*, 796 F.2d 474 (4th Cir. 1986) (mem.).

263. *Id.* at 241.

264. *Id.*

265. *Id.* Sellner alleged that the murderer was the son of the former police chief for the county in which he served on the police force; that the police chief removed his son from the state prior to the filing of charges; and that several key investigators took part in the cover up, including the State's Attorney to whom Sellner presented his evidence. *Id.*

266. *Id.* at 249. Sellner claimed that this denial violated his federally protected rights by an official acting under color of law. *Id.* at 249-51 (referring to 42 U.S.C. § 1983).

ney has determined, in the exercise of his prosecutorial discretion, not to pursue allegations of criminal wrongdoing.”²⁶⁷ The decision not to prosecute the case, or assist Sellner in presenting evidence to a grand jury, did not violate his constitutional right of access to the courts because this decision was within the State’s Attorney’s discretion.²⁶⁸

Maryland courts also have recognized the breadth of prosecutorial discretion in a line of cases in which alleged discriminatory prosecution resulted in harsher penalties for some criminal offenders than others committing the substantially same act. For example, in *Purohit v. State*,²⁶⁹ the owner of an adult video store was charged with violating state obscenity laws after an undercover police officer purchased a video from the defendant’s store.²⁷⁰ Prior to trial, the State filed a motion in limine to determine the validity of the defendant’s discriminatory prosecution defense.²⁷¹ At the pretrial hearing on this motion, the defendant offered evidence that other adult video stores were distributing the same type of material, but were not prosecuted.²⁷² On appeal, the issue was whether or not discriminatory prosecution was a defense for the jury to consider.²⁷³ The court again recognized that the State’s Attorney’s decision to proceed with a criminal prosecution is “replete with broad discretion.”²⁷⁴ In deciding that discriminatory prosecution is a matter for the trial judge to consider, the court noted that the exercise of some selectivity in prosecution does not violate the right of equal protection unless the selectivity is both deliberate and based on a prohibited classification, such as race.²⁷⁵ Because the court found that the decision to prosecute in this

267. See *id.* at 251 (noting further that Maryland State’s Attorneys are vested “with broad official discretion to institute and prosecute criminal causes” (internal quotation marks omitted) (quoting *Brack v. Wells*, 184 Md. 86, 90, 40 A.2d 319, 321 (1944))).

268. *Id.*

269. 99 Md. App. 566, 638 A.2d 1206 (1994).

270. *Id.* at 569-70, 638 A.2d at 1207-08.

271. *Id.* at 570, 638 A.2d at 1208. The trial court recognized the defense of discriminatory prosecution as an allegation of a “defect in the institution of the prosecution,” which, under Rule 4-252, must be made in a mandatory pretrial motion. *Id.* at 570, 638 A.2d at 1208; see also MD. RULE 4-252(a)(1), (b) (noting that such a motion must be raised within 30 days after the earlier of the appearance of counsel or the first appearance of the defendant before the court, or else the motion is waived absent a showing of good cause). Although the defendant failed to file a timely motion to dismiss, the trial court entertained the motion on a “good cause” basis. See *Purohit*, 99 Md. App. at 570, 638 A.2d at 1208.

272. *Purohit*, 99 Md. App. at 570-71, 638 A.2d at 1208.

273. *Id.* at 577, 638 A.2d at 1211.

274. *Id.* (citing *Murphy v. Yates*, 276 Md. 475, 348 A.2d 837 (1975)).

275. *Id.* at 578, 638 A.2d at 1212 (citing *Oyler v. Boles*, 368 U.S. 448, 456 (1962)).

case was not based on any "arbitrary or invidious criteria," it rejected the defendant's allegation of discriminatory prosecution.²⁷⁶

b. Advantages of Plea Agreements.—In general, plea bargaining has been accepted as an effective way of accomplishing the goals of this country's criminal justice system.²⁷⁷ The Supreme Court has even gone so far as to say that plea bargaining is an "essential component of the administration of justice."²⁷⁸ Because an estimated ninety percent of felony convictions are the result of guilty pleas, plea bargaining significantly helps courts administer their caseloads.²⁷⁹

Plea bargaining not only aids with the administration of justice, but also benefits the parties involved in the case. Plea bargaining relieves a criminal defendant who has little hope of gaining an acquittal from the burden of enduring a trial on the merits.²⁸⁰ In addition, plea bargaining allows the defendant to begin serving his sentence immediately, and his cooperation with prosecutors helps reduce the defendant's possibility of receiving a longer sentence.²⁸¹

Plea bargaining serves to implement a number of the purposes of criminal punishment.²⁸² First, plea bargaining serves the rehabilitative aspect of criminal punishment.²⁸³ Because plea agreements require the defendant to plead guilty, guilty defendants are forced to recognize that their conduct was wrong and to accept responsibility.²⁸⁴ This act of repentance is a vital step to beginning the rehabilitative process, because the defendant is expected to recognize the error

276. *Id.* at 579, 638 A.2d at 1212.

277. *See* *Brady v. United States*, 397 U.S. 742, 751-52 (1970) (noting several factors that illustrate the benefits of plea bargaining and its role as an essential component of the criminal justice system, including a lesser penalty for the defendant and more efficient administration of justice for the state).

278. *See* *Santobello v. New York*, 404 U.S. 257, 260 (1971) (noting further the importance of plea bargaining in alleviating the pressures of overcrowded criminal dockets).

279. *See* James A. Cramer et al., *The Judicial Role in Plea-Bargaining*, in *PLEA-BARGAINING* 139, 139 (William F. McDonald & James A. Cramer eds., 1980).

280. *See* *Brady*, 397 U.S. at 752.

281. *Id.*

282. Four basic theories behind society's decision to punish those who are found guilty of criminal activity include the following: (1) retribution through fine or imprisonment; (2) rehabilitation, so that the criminal can return to society as a productive member; (3) deterrence; (4) incapacitation, i.e., removal of the criminal from society so that, during incarceration, he cannot continue to do harm. *See* 1 HELEN SILVING, *CRIMINAL JUSTICE* 1, 18-19, 48, 53 (1971).

283. *See* STANDARDS RELATING TO PLEAS OF GUILTY 41 (Approved Draft, 1968) (noting that a guilty plea defendant "has acknowledged his guilt and shown a willingness to assume responsibility for his conduct").

284. *Id.* at 42-43.

of his ways.²⁸⁵ Second, plea agreements serve the deterrent aspect of criminal punishment.²⁸⁶ A plea on the part of a guilty defendant increases the probability of a penalty by eliminating the uncertainties of a criminal trial.²⁸⁷ At trial, key witnesses may refuse to cooperate or the jury may respond unexpectedly to the emotions of the proceeding.²⁸⁸ Plea bargaining eliminates these possibilities and imposes penalties where they might otherwise be difficult to obtain.²⁸⁹ The fact that more criminals receive penalties serves to deter those who otherwise would commit crimes.²⁹⁰ Finally, plea bargaining serves the function of incapacitation.²⁹¹ Confinement of the criminal defendant protects the public from those defendants awaiting trial who may commit additional crimes if released on bail.²⁹² Because criminal defendants who accept plea agreements begin serving their prison sentence immediately, the practice of plea-bargaining decreases their opportunities to harm society.²⁹³

For the State, the benefits of plea bargaining consist of enabling the State to direct its limited resources to cases in which guilt is more difficult to prove.²⁹⁴ The State can also offer a criminal defendant a more lenient sentence in exchange for information that will aid in the prosecution of other crimes.²⁹⁵ In addition, some believe that without plea bargaining, the criminal justice systems in a vast majority of jurisdictions "would grind to a halt"²⁹⁶ because the need for additional judges, prosecutors, public defenders, and courtrooms would explode.

285. *Id.* at 41-42, 42 n.12 (citing a questionnaire of 140 federal district judges). *But see id.* at 44 (observing that some criminals plead guilty in order to mitigate their sentence and not because they have remorse for their conduct (citing Comment, 66 YALE L.J. 204, 210 (1956))).

286. *Id.* at 40.

287. *Id.* at 40-41.

288. *Id.*

289. *Id.* at 41.

290. *Id.* at 40.

291. *See Santobello v. New York*, 404 U.S. 257, 261 (1971) (noting that disposition of charges after plea "protects the public from those accused persons who are prone to continue criminal conduct even while on pretrial release").

292. *Id.*

293. *Id.*

294. *See State v. Brockman*, 277 Md. 687, 693, 357 A.2d 376, 381 (1976) (explaining that plea agreements, by "eliminat[ing] many of the risks, uncertainties and practical burdens of trial, permit the judiciary and prosecution to concentrate their resources on those cases in which they are most needed").

295. *Id.*

296. *See STANDARDS RELATING TO PLEAS OF GUILTY*, *supra* note 283, at 50 (internal quotation marks omitted) (citing Harris B. Steinberg & Monrad G. Paulsen, *A Conversation with Defense Counsel on Problems of a Criminal Defense*, 7 PRAC. LAW. 25, 31 (1961)).

c. *Legislative Intent of Maryland Drug Laws.*—The General Assembly enacted Maryland's drug laws to combat the rising problem of illegal use of controlled substances. In a section of the Maryland Code expressing its legislative findings and purpose, the General Assembly has stated that its intent in passing laws against possession and distribution of dangerous controlled substances is to protect the health and welfare of the residents of Maryland.²⁹⁷ The General Assembly sought to ensure that these controlled substances were available only for legitimate scientific research and to prevent the "serious danger" of their abuse.²⁹⁸ In addition to recognizing the threat presented by these substances, the General Assembly has recognized that people who distribute these drugs are a special threat to Maryland residents.²⁹⁹ Section 286(c) of the drug offender laws imposes a ten-year mandatory minimum sentence for anyone convicted of repeatedly violating the law against unlawful manufacture and distribution of dangerous narcotic drugs.³⁰⁰ This provision illustrates the heightened interest that Maryland has in deterring the abuse of drugs by punishing more severely those who repeatedly violate its drug laws.

While considering the implementation of mandatory minimum sentences, the General Assembly relied on findings contained in a study of heroin addicts and their propensity to commit crime while addicted.³⁰¹ This study showed that criminal activity among heroin addicts was six times greater when those people were using heroin as opposed to when they were off the drug.³⁰² The fact that the General Assembly considered such a study when it enacted the mandatory minimum penalties shows its concern about the crime perpetrated by repeat drug users. By targeting this segment of the population that is a high-crime risk to the residents of Maryland, the General Assembly was attempting to reduce the harm that repeat offenders cause.

3. *The Court's Reasoning.*—In *Beverly*, the Court of Appeals held that under Maryland Rule 4-245, a prosecutor may refrain from giving a criminal defendant notice that the State will seek mandatory penalties, or may decide to withdraw notice to seek mandatory penalties

297. MD. ANN. CODE art. 27, § 276(a) (1996).

298. *Id.*

299. *Id.*

300. MD. ANN CODE art. 27, § 286(c) (1996).

301. JOHN C. BALL ET AL., *THE CRIMINALITY OF HEROIN ADDICTS WHEN ADDICTED AND WHEN OFF OPIATES* (1980). This study is included with the legislative history of the mandatory minimum sentence law. See S. 447.

302. BALL ET AL., *supra* note 301, at 1.

after it has been given.³⁰³ The court reasoned that, by enacting Rule 4-245, the legislature did not intend to remove the prosecutor's discretion to "plea bargain away a mandatory minimum subsequent offender sentence."³⁰⁴ Instead, this rule was intended "to prevent an inadvertent waiver from preventing the imposition of a *mandatory* penalty for a subsequent offender."³⁰⁵ The court also relied on the strong history of prosecutorial discretion in Maryland to arrive at its decision.³⁰⁶ The court did, however, limit its holding to cases in which the mandatory penalty must be invoked by supplying notice and proof of the defendant's subsequent offender status.³⁰⁷ The court's decision does not extend to enhanced sentences that must be imposed because of the nature of the circumstances of the crime.³⁰⁸

In writing for the majority, Judge Chasanow first addressed the State's preliminary arguments challenging Beverly's standing to appeal the trial judge's decision.³⁰⁹ The State argued that the defendant acquiesced in the trial court's erroneous ruling and therefore abandoned his right to appeal this issue.³¹⁰ The State based this argument on a limited portion of the trial record in which the defense counsel agreed with the trial court's interpretation of Rule 4-245.³¹¹ Upon further examination of the trial court record, however, the majority determined that Beverly's counsel litigated this issue vigorously and that the defense counsel, seeing that the trial judge would not compromise, "politely continued on with the matter of the day."³¹² The

303. *Beverly*, 349 Md. at 126-27, 707 A.2d at 101. The court believed that the decision not to give notice pursuant to Rule 4-245 or the withdrawal of such notice is a form of charge bargaining, within the "absolute discretion" of the prosecutor, as distinct from sentence bargaining, which a judge is free to accept or reject. *See id.* at 127-28, 707 A.2d at 101; *infra* text accompanying notes 145-146.

304. *See Beverly*, 349 Md. at 125-26, 707 A.2d at 100 (noting further that Rule 4-245 "does not attempt to correct any State's Attorney's abuses which may exist in this area [of plea-bargaining]" (internal quotation marks omitted) (quoting Memorandum from Robert J. Ryan, Chairman of the Criminal Rules Subcommittee to Members of the Rules Committee (June 2, 1982))).

305. *Id.* at 125, 707 A.2d at 100 (internal quotation marks omitted) (quoting Ryan, *supra* note 304).

306. *Id.* at 121-22, 707 A.2d at 98-99; *see supra* notes 250-276 and accompanying text (discussing the history of prosecutorial discretion in Maryland).

307. *Beverly*, 349 Md. at 127, 707 A.2d at 101.

308. *Id.*

309. *Id.* at 117, 707 A.2d at 96.

310. *Id.*

311. *See id.* (quoting defense counsel's remark at trial that the trial judge's interpretation of the issue "sound [sic] right to me, Your Honor, and I have no argument as to that").

312. *Id.* at 118, 707 A.2d at 97. The portion of the trial court record reproduced in the majority opinion contains a lengthy discussion between the judge and the State's Attorney

court, noting that it would ignore the everyday functioning of the trial court to characterize this remark as acquiescence, dismissed this argument by the State.³¹³

The State also argued that Beverly never accepted the plea agreement, and consequently that he failed to preserve the issue for appeal.³¹⁴ Distinguishing this case from *Luce v. United States*,³¹⁵ and *Jordan v. State*,³¹⁶ in both of which a defendant was required to testify in order to preserve for review the trial court's pretrial evidentiary rulings, the *Beverly* court reasoned that the harm at issue was not dependent on what a defendant would have testified to at trial—and thus remote and speculative; instead, the harm was concrete because it consisted of the difference between the sentence Beverly actually received and the sentence he would have received under the plea agreement that the judge refused to accept solely due to a “mistake of law.”³¹⁷ Moreover, unlike a defendant's decision not to testify on account of a pretrial ruling, Beverly's decision to plead not guilty and go to trial was based solely on the trial judge's mistaken legal determination.³¹⁸ For these reasons, Beverly's decision not to proceed with a guilty plea did not constitute a waiver of the issue.³¹⁹

After disposing of these preliminary issues, the court considered whether the prosecution, in order to implement a plea-bargain, could withdraw its intent to seek a mandatory sentence after the defendant had received notice of that intent pursuant to Maryland Rule 4-245.³²⁰

as well. *Id.* at 111-14, 707 A.2d at 93-95. This record indicates that the prosecutor also argued this point to the trial judge. *See id.* at 112, 707 A.2d at 93 (quoting the remark of the State's Attorney that “if the State does not invoke the mandatory [sentence], then the court is free to give whatever sentence the court deems appropriate in the case”). The fact that both sides were trying to convince the judge to allow the prosecutor to withdraw the notice makes it clear that this point was argued thoroughly.

313. *Id.* at 118, 707 A.2d at 97.

314. *Id.* at 119, 707 A.2d at 97.

315. *See* 469 U.S. 38, 43 (1984) (holding that “to raise and preserve for review the claim of improper impeachment with a prior conviction, a defendant must testify”).

316. *See* 323 Md. 151, 155-59, 591 A.2d 875, 877-79 (1991) (holding that the issue of the voluntariness of an incriminatory statement is not preserved for appeal when a defendant fails to testify on his own behalf and merely proffers to the court that, but for its ruling, he would testify).

317. *See Beverly*, 349 Md. at 120-21, 707 A.2d at 98 (noting that the plea agreement contemplated a ten-year sentencing cap, whereas Beverly was sentenced to fifteen years, ten of which without parole).

318. *Id.* at 121, 707 A.2d at 98.

319. *Id.* at 118, 707 A.2d at 97.

320. *Id.* at 121, 707 A.2d at 98. Because the State agreed with the defendant that the plea-bargain should have been accepted by the trial judge, it did not argue that the trial court's substantive decision was correct regarding its inability to accept such an agreement after the State has withdrawn notice to the defendant. *Id.* at 128, 707 A.2d at 102. Instead,

The court began this discussion by looking at the history of prosecutorial discretion in Maryland.³²¹ The court relied on statutory authority,³²² as well as its decision in *Brack v. Wells*,³²³ in which it decided that the State's Attorney has wide discretion to decide which cases to prosecute.³²⁴ Thus, the *Beverly* court reaffirmed that in Maryland the State's Attorney has broad discretion to decide which cases shall command the resources of the State.³²⁵ This discretion allows the State's Attorney to decide whether or not to invoke the mandatory penalty.³²⁶

Next, the court discussed the benefits of plea bargaining and its role in the efficient administration of justice.³²⁷ The court recognized that, most importantly, plea bargaining reduces the heavy caseload that would otherwise overwhelm courts.³²⁸ In addition, the court noted several benefits of plea bargaining that the Supreme Court had identified in *Santobello v. New York*:³²⁹

[Plea bargaining] leads to prompt and largely final disposition of most criminal cases; it avoids much of the corrosive impact of enforced idleness during pre-trial confinement for those who are denied release pending trial; it protects the public from those accused persons who are prone to continue criminal conduct even while on pretrial release; and, by shortening the time between charge and disposition, it enhances whatever may be the rehabilitative prospects of the guilty when they are ultimately imprisoned.³³⁰

The Court of Appeals added that plea bargaining allows the State to focus its limited resources on cases in which the most work is needed.³³¹

the State argued that *Beverly* had failed to preserve the issue for appeal. See *supra* notes 314-319 and accompanying text.

321. *Beverly*, 349 Md. at 121-22, 707 A.2d at 98.

322. See *id.* at 121, 707 A.2d at 98 (noting that the State's Attorney is directed to "prosecute and defend, on the part of the State, all cases in which the State *may* be interested" (emphasis added) (internal quotation marks omitted) (quoting MD. ANN. CODE art. 10, § 34 (1998))).

323. See *supra* notes 250-261 and accompanying text (discussing this case).

324. *Beverly*, 349 Md. at 121-22, 707 A.2d at 98.

325. *Id.* at 122, 707 A.2d at 98.

326. *Id.*

327. *Id.*

328. *Id.*, 707 A.2d at 98-99.

329. 404 U.S. 257 (1971).

330. *Beverly*, 349 Md. at 122-23, 707 A.2d at 99 (internal quotation marks omitted) (quoting *Santobello*, 404 U.S. at 261).

331. *Id.* at 123, 707 A.2d at 99 (citing *State v. Brockman*, 277 Md. 687, 693, 357 A.2d 376, 381 (1976)).

Having observed the history and benefits of plea bargaining, the court turned to the specific circumstances of the case in order to determine whether they constituted a "proper condition" for plea bargaining.³³² The Maryland Rules expressly provide for plea bargaining under Rule 4-243, which states that "[t]he defendant may enter into an agreement with the State's Attorney for a plea of guilty or nolo contendere on any proper condition"³³³ The Court of Appeals considered this language in the context of determining whether plea bargaining "around" a mandatory sentence was an acceptable condition.³³⁴ The court noted that the subsequent offender statute at issue in this case calls for a mandatory sentence of ten years without parole if the defendant was convicted under the statute on a prior occasion.³³⁵ The court further noted that under Maryland Rule 4-245(c), the State's Attorney is required to provide notice of the intention to seek a mandatory penalty and, at sentencing, to prove the prior convictions beyond a reasonable doubt.³³⁶ Once the State has satisfied its burden, the trial judge must impose a minimum sentence of ten years without parole.³³⁷ The court observed, however, that if the State's burden is not satisfied, the trial judge is not permitted to impose the mandatory penalty.³³⁸ Thus, the purpose of Rule 4-245 is to afford the defendant the opportunity to challenge the State's assertion that he is a repeat offender, not to remove the discretion vested in the prosecutor to plea-bargain.³³⁹ The court noted that the legislative history of the Rule supported the interpretation that it was not intended to remove the prosecutor's ability to plea-bargain "around" a mandatory sentence; instead, the rule was intended to prevent an inadvertent waiver from preventing the imposition of a mandatory penalty.³⁴⁰ Thus the court concluded that a prosecutor could withdraw notice of mandatory penalties as part of a plea agreement reached with a defendant.³⁴¹

332. *Id.* (quoting MD. RULE 4-243).

333. MD. RULE 4-243(a).

334. *Beverly*, 349 Md. at 123, 707 A.2d at 99.

335. *See id.* at 123-24, 707 A.2d at 99 (discussing MD. ANN. CODE art. 27, § 286).

336. *Id.* at 124, 707 A.2d at 99-100 (citing MD. RULE 4-245(c)).

337. *Id.* at 124, 707 A.2d at 100 (citing *State v. Montgomery*, 334 Md. 20, 21 n.1, 637 A.2d 1193, 1193 n.1 (1994)).

338. *Id.* at 125, 707 A.2d at 100.

339. *Id.*

340. *Id.* (noting that "[t]his rule does not attempt to correct any State's Attorney's abuses which may exist in this area [of plea bargaining]" (quoting *Ryan*, *supra* note 304)).

341. *See id.* at 126, 707 A.2d at 101 (noting that the decision to pursue a mandatory sentence "is part of the prosecutorial function, rather than a [trial judge's] sentencing function" (internal quotation marks omitted) (quoting *Middleton v. State*, 67 Md. App.

The court also addressed the role of the trial judge in the plea bargaining process.³⁴² Although recognizing that a trial judge may reject a plea agreement about a sentence, the court explained that a trial judge has no authority to reject a charge agreement where the State agrees to withdraw or reduce the charges against a defendant.³⁴³ The court characterized an agreement by the State to withdraw a notice of mandatory sentence as a form of charge bargaining that cannot be rejected by the trial judge.³⁴⁴

For these reasons, the trial judge's decision to reject Beverly's plea agreement did not constitute a permissible exercise of discretion, but a failure to recognize that she had the discretion to sentence in accord with the plea agreement; as a result, the Court of Appeals affirmed Beverly's convictions, but remanded the case for a new sentencing hearing to allow Beverly to establish the existence and conditions of the plea agreement struck with the State.³⁴⁵

Writing in dissent, Judge Wilner claimed that the decision by the Court of Appeals allows the prosecution to "thwart" the will of the General Assembly and could compel the court to impose an "illegal sentence."³⁴⁶ The dissent began by arguing that no plea agreement with the defendant was ever submitted to the trial court for approval and that there was nothing more than a hypothetical discussion about the possibility of a plea-bargain.³⁴⁷ As a result, the dissent believed that the defendant waived his right to dispute the trial judge's interpretation of Rule 4-243 and her duties under the mandatory minimum sentence provision.³⁴⁸

The dissent also addressed what it perceived to be the prosecutor's ability to "thwart" the legislature's will.³⁴⁹ The dissent first recognized that, indeed, the prosecutor has broad discretion in determining which cases to pursue, and that plea bargaining is an accepted and necessary part of our criminal justice system.³⁵⁰ However, the dissent argued that the prosecutorial discretion embodied in Rule

159, 169, 506 A.2d 1191, 1196 (1986), *overruled on other grounds by* Fairbanks v. State, 331 Md. 482, 629 A.2d 63 (1993))). The *Beverly* court noted that, in *Middleton*, the Court of Special Appeals "held that a prosecutor may withdraw a notice of mandatory penalties." *Id.* at 126, 707 A.2d at 100.

342. *Id.* at 126-27, 707 A.2d at 101.

343. *Id.* at 127, 707 A.2d at 101.

344. *Id.*

345. *Id.* at 127-29, 707 A.2d at 101-02.

346. *Id.* at 130, 707 A.2d at 103 (Wilner, J., dissenting).

347. *Id.* at 135-36, 707 A.2d at 105.

348. *Id.* at 137, 707 A.2d at 106.

349. *Id.*

350. *Id.* at 137-38, 707 A.2d at 106.

4-243 does not allow for the imposition of an illegal sentence.³⁵¹ According to the dissent, the majority's position enabled a prosecutor to frustrate the mandatory minimum sentence provision by "refusing to produce relevant evidence [of prior convictions] that is in his or her possession or by deliberately refusing to perform the ministerial act required by Rule 4-245 of sending a notice."³⁵² The dissent felt this behavior to be akin to misconduct in office.³⁵³ In essence, the dissent believed that the majority had allowed the prosecutor to overstep his bounds and infringe on the General Assembly's law-making power.³⁵⁴

4. *Analysis.*—In deciding whether to allow the prosecutor to withdraw her notice of mandatory penalties, the *Beverly* court had to weigh what seem to be two competing interests: (1) the long standing practice in Maryland of allowing broad prosecutorial discretion and (2) the duty imposed upon the State's Attorney by the people of Maryland to "prosecute and defend, on the part of the State, all cases in which the State may be interested."³⁵⁵

The majority in *Beverly*, emphasizing the first interest, held that a prosecutor may withdraw her notice of intent to seek mandatory penalties, even if the defendant has received notice of his status as a repeat offender.³⁵⁶ In doing so, the court ruled that the withdrawal of notice was a form of charge bargaining rather than sentence bargaining.³⁵⁷ This distinction is important, because the prosecutor, and not the trial judge, has the sole discretion to decide what charges to file against a defendant.³⁵⁸ Thus, the court found that in *Beverly* the trial judge erred by rejecting the charge bargain because she did not have the authority to do so.³⁵⁹

351. *Id.* at 138, 707 A.2d at 106.

352. *Id.* at 139, 707 A.2d at 107.

353. *Id.*

354. *Id.* at 141, 707 A.2d at 108.

355. MD. ANN. CODE art. 10, § 34 (1998).

356. *Beverly*, 349 Md. at 126-27, 707 A.2d at 101.

357. *Id.* at 127, 707 A. 2d at 101.

358. *Id.* Sentence bargaining is a plea agreement in which the prosecutor agrees to recommend a lighter sentence to the trial judge in exchange for the defendant's plea of guilty. The judge is not bound to follow this recommendation and has the discretion to impose any sentence mandated by the law. Charge bargaining, on the other hand, is an agreement in which the prosecutor agrees to reduce or dismiss some or all of the charges against the defendant. This type of agreement does not afford the trial judge as much discretion in sentencing because the judge is limited in the sentence that he or she can impose by the sentences called for under the amended charges. In deciding which offenses to charge a particular defendant with, the prosecutor has sole discretion. The trial judge has no authority to invade this area of the prosecutor's duty. *Id.*

359. *Id.* at 127-28, 707 A.2d at 101.

The Court of Appeals reached the correct result, even though it can be argued that its distinction between charge bargaining and sentence bargaining allows the prosecutor to undermine the legislative intent behind section 286(c), which was to sentence repeat drug dealers to a minimum sentence of ten years.³⁶⁰ This practice *appears* to undermine the law-making function of the General Assembly, a practice the dissent suggests that the court should not approve.³⁶¹ However, flexibility of charge bargaining allows the prosecutor to focus prosecutorial resources on those offenders who pose the greatest threat to citizens of Maryland.³⁶² The State's Attorney is in a better position than the General Assembly to determine whether or not a repeat offender poses a serious threat to the community because she has the individual facts in front of her to make an accurate assessment. The dissent points out that courts of other states have not endorsed such a practice, and asserts that language from prior decisions of the Court of Appeals are inconsistent with the ruling in *Beverly*.³⁶³ Prior to *Beverly*, the Court of Appeals ruled that where the trial court fails to sentence within the mandates of the statute, the State shall have the right to appeal.³⁶⁴ *Beverly* did not overrule these previous cases, but instead allowed the prosecutor the discretion "not to meet the statutory conditions [under which a trial judge is required to impose a minimum sentence] by not giving notice [of intent to seek a mandatory penalty] and by not presenting evidence sufficient to prove beyond a reasonable doubt that a defendant has a prior conviction."³⁶⁵

360. For this argument, made by the dissent, see *supra* notes 346-354 and accompanying text.

361. *Beverly*, 349 Md. at 138, 707 A.2d at 106-07 (Wilner, J., dissenting).

362. See *supra* Part 2.b (discussing the advantages of plea bargaining, which include flexible and efficient prosecution of cases).

363. *Beverly*, 349 Md. at 138, 707 A.2d at 106-07 (Wilner, J., dissenting); see *Shilling v. State*, 320 Md. 288, 293, 577 A.2d 83, 85-86 (1990) (stating that the trial judge failed to follow the legislature's intent when he sentenced a repeat drunk driver to probation instead of a mandatory sentence); *State v. Hannah*, 307 Md. 390, 403, 514 A.2d 16, 22 (1986) (holding that the State was permitted to appeal a trial judge's imposition of probation before judgment for a weapons violation in light of the minimum sentence explicitly mandated by the legislature); *State ex rel. Sonner v. Shearin*, 272 Md. 502, 504, 325 A.2d 573, 574-75 (1974) (holding the trial judge had no authority to suspend the defendant's sentence when the statute called for a five year minimum sentence).

364. *Shilling*, 320 Md. at 294, 577 A.2d at 86.

365. *Beverly*, 349 Md. at 126, 707 A.2d at 100. Moreover, the court limited its holding to "circumstances in which the mandatory penalty is under a subsequent offender statute where the state has the obligation to supply notice and proof of subsequent offender status and is not necessarily applicable where the enhanced sentence is due to the nature of the circumstances of the offense itself." *Id.* at 127, 707 A.2d at 101.

In light of the strong prosecutorial discretion in Maryland,³⁶⁶ and the many benefits that are achieved by plea agreements,³⁶⁷ the court was correct to allow the State's Attorney's office the power to allocate its resources as efficiently as possible and not to be forced to prosecute cases merely because a mandatory minimum sentence could apply to them. Absent a clear intent on the part of the General Assembly, the State's Attorney should have the power to determine which cases to prosecute even if that means indirectly determining when legislatively mandated penalties should be imposed.

The State of Kansas has eliminated this perceived dilemma by statutorily limiting the right of prosecutors to plea-bargain "around" a mandatory sentence.³⁶⁸ The validity of such a statutory limitation was tested in *State v. Compton*,³⁶⁹ in which the Supreme Court of Kansas reviewed this provision. In *Compton*, the State appealed a decision by the lower court, which held that the provision of the drunk driving statute in question was unconstitutional.³⁷⁰ The defendants were charged with violating the drunk driving laws of Kansas and were found to be repeat offenders under the statute.³⁷¹ The issue before the court was whether the statute's prohibition of plea bargaining was an encroachment by the legislature on the powers of the executive branch.³⁷² Kansas, like Maryland, grants the prosecutor wide discretion in determining what charges to file; this discretion, however, is not completely without limits.³⁷³ In finding that this provision was constitutional, the court looked to the objectives sought by the legislature in passing this provision of the drunk driving statute.³⁷⁴ The court found that the objectives of the legislature were to deter the serious problem of drunk driving by making penalties certain and se-

366. See *supra* Part 2.a (discussing the history of prosecutorial discretion in Maryland).

367. See *supra* Part 2.b (discussing the advantages of plea bargaining in the criminal justice system).

368. The relevant portion of Kansas's drunk driving statute provides:

No plea bargaining agreement shall be entered into nor shall any judge approve a plea bargaining agreement entered into for the purpose of permitting a person charged with a violation of this section, or a violation of any ordinance of a city or resolution of any county in this state which prohibits the acts prohibited by this section, to avoid the mandatory penalties established by this section or by the ordinance.

KAN. STAT. ANN. § 8-1567(n) (1991).

369. 664 P.2d 1370, 1373-74 (Kan. 1983).

370. *Id.* at 1372-73.

371. *Id.* at 1373.

372. *Id.* at 1376-79.

373. *Id.* at 1377.

374. *Id.* at 1378.

vere, objectives that were consistent with those of the executive and judicial branch.³⁷⁵

Similarly, if the Maryland General Assembly desires to ensure that mandatory penalties are imposed on repeat drug offenders, it should enact a provision similar to that in Kansas's drunk driving statute. Such a provision would limit the powers of the prosecutor to plea-bargain "around" mandatory minimum sentences. If the legislature believes that charge bargaining undermines the intent of its mandatory sentence for repeat drug offenders, then the legislature itself—and not the Court of Appeals—should be the one to remedy this problem.

5. *Conclusion.*—In *Beverly v. State*, the Court of Appeals held that a prosecutor can plea-bargain "around" a mandatory minimum sentence by withholding the required notice of intent to seek the sentence, or by withdrawing that notice after it has been given.³⁷⁶ This decision follows the longstanding history of prosecutorial discretion in the State of Maryland.³⁷⁷ This ruling strengthens the prosecutor's ability to circumvent harsh penalties if they seem unwarranted in a given case, and provides prosecutors with the flexibility they need to control their caseloads. The General Assembly enacted these penalties because of the threat that repeat drug offenders pose to the welfare of the residents of Maryland.³⁷⁸ The Court of Appeals properly recognized that prosecutors are granted broad discretion to decide which cases are worth pursuing. If the General Assembly believes that repeat drug offenders are so dangerous that a prosecutor's discretion should be limited, then the General Assembly should make this explicit in a provision similar to the one contained in Kansas's drunk driving statute.

CHRIS B. EDWARDS

C. *The Fourth Amendment Nexus Requirement: Homes and Cars*

In *State v. Ward*,³⁷⁹ the Court of Appeals ruled on a narrow issue of Fourth Amendment jurisprudence. The court considered whether the facts in an affidavit provided the required nexus between the evidence sought and the two places searched, the defendant's home and

375. *Id.*

376. *Beverly*, 349 at 1126-27, 707 A.2d at 101.

377. See *supra* Part 2.a (discussing the history of prosecutorial discretion in Maryland).

378. See *supra* Part 2.c.

379. 350 Md. 372, 712 A.2d 534 (1998).

the defendant's car.³⁸⁰ In particular, the court contemplated whether the anonymity of witnesses, defendant's prior arrests for handgun violations, the fact that no weapon had been found, and the fact that the defendant had been picked up near his vehicle two days after the murder gave the magistrate enough evidence to conclude that probable cause existed to search the defendant's house and car.³⁸¹ The four-three majority found an adequate nexus for both locations searched, and thus reversed the decision of the Court of Special Appeals and reinstated the defendant's conviction.³⁸² In so doing, the court used the same facts and logic that permitted the search of the house to validate the search of the car.³⁸³ The result is muddled law that has the potential to permit the issuance of search warrants for automobiles when the supporting affidavit contains absolutely no facts connecting the evidence sought to the car to be searched.

1. *The Case.*—On the night of September 30, 1992, Alfred Stewart was shot several times and killed on a public street in Baltimore City.³⁸⁴ Over the next two days, the police received several anonymous tips that Gary Ward had committed the murder.³⁸⁵ Ward was brought to police headquarters for questioning and his automobile was towed to the police station.³⁸⁶ Ward was not charged at the time and was released, but the police retained possession of Ward's automobile because his license plates had expired.³⁸⁷ Three days after Stewart was murdered, the police secured an eyewitness who identified Ward as Stewart's killer.³⁸⁸ Accordingly, the police obtained a warrant to search Ward's residence and his automobile for "[h]andguns, [a]mmunition [and] [p]ersonal papers showing ownership/possession of a firearm."³⁸⁹

The sworn affidavit filed in support of the warrant included information about the anonymous tips and the eyewitness identification.³⁹⁰ In addition, the affidavit listed Ward's address, the fact that Ward had an automobile registered to that address, and Ward's prior arrest rec-

380. *Id.* at 375-78, 712 A.2d at 535-36.

381. *Id.*

382. *Id.* at 378, 389, 712 A.2d at 536, 542.

383. *Id.* at 386, 712 A.2d at 540-41.

384. *Id.* at 374, 712 A.2d at 535.

385. *Id.*

386. *Id.*

387. *Id.*

388. *Id.*

389. *Id.* at 391 n.2, 712 A.2d at 543 n.2 (Bell, C.J., dissenting) (quoting the warrant application).

390. *Ward*, 350 Md. at 375 n.2, 712 A.2d at 535 n.2.

ord for committing handgun violations.³⁹¹ Pursuant to this warrant, the police searched Ward's home and automobile and recovered three .357 "MAG" hollow-point cartridges from the automobile.³⁹² The State entered these cartridges into evidence at Ward's trial on the charges of first degree murder and of using a handgun in the commission of a crime of violence.³⁹³ Ward was convicted on both counts and sentenced to life imprisonment.³⁹⁴

The search warrant issued for Ward's residence and automobile gave rise to voluminous appellate litigation. After his conviction, Ward appealed the trial court's decision not to hold a suppression hearing.³⁹⁵ In an unreported opinion, the Court of Special Appeals remanded the case for the sole purpose of conducting a suppression hearing.³⁹⁶ On remand, the trial court held a suppression hearing but denied Ward's motion to suppress.³⁹⁷ Accordingly, Ward appealed once again.³⁹⁸ Ward won in his second entreaty to the Court of Special Appeals, which, in another unreported opinion, reversed the trial court's denial of his motion to suppress and vacated Ward's conviction.³⁹⁹ The Court of Special Appeals found that the affidavit did not supply an adequate nexus "between the item sought and the place to be searched,"⁴⁰⁰ and held that:

[t]here was insufficient information to connect the evidence sought, firearms and ammunition, to the place searched, appellant's car. There was no information that appellant kept handguns or ammunition in his car, nor was there any information that the car was involved in any way with the shooting death of the victim. In analogous cases involving residential searches, a review of Maryland case law reveals that generally

391. *Id.*

392. *Id.* at 374, 712 A.2d at 535.

393. *Id.*

394. *Id.*

395. *Id.* The trial court denied Ward's request for a suppression hearing because the evidence seized that was offered in the murder trial had already been the subject of a suppression hearing in a criminal case against Ward involving a shooting on September 17, 1992. *Id.* at n.1. The motion to suppress in that case had been denied, thus the trial court concluded that a second suppression hearing was not needed in Ward's murder trial. *Id.*

396. *Id.* at 374, 712 A.2d at 535.

397. *Id.*

398. *Id.*

399. *Id.* at 374-75, 712 A.2d at 535.

400. *Id.* at 375, 712 A.2d at 535 (quoting the Court of Special Appeals's decision in *Ward*).

something more than was shown here is required to justify a search.⁴⁰¹

Following this decision, the State moved unsuccessfully for reconsideration.⁴⁰² The Court of Appeals subsequently granted the State's petition for a writ of certiorari.⁴⁰³ The court addressed the sole issue of whether the underlying affidavit had supplied a sufficient nexus between the places searched, the crime committed, and the items sought.⁴⁰⁴

2. *Legal Background.*—

a. *Guidelines for Appellate Review.*—In *Illinois v. Gates*,⁴⁰⁵ the Supreme Court ruled that a reviewing court should defer greatly to the probable cause determination made by the magistrate who issues a warrant.⁴⁰⁶ The Supreme Court, in defining the duties of a reviewing court, concluded that it should examine the magistrate's decision only to ensure that the underlying affidavit contains a "substantial [factual] basis for . . . conclud[ing] that probable cause existed."⁴⁰⁷ Specifically, the *Gates* majority held that a warrant based on an anonymous tip provided probable cause to search the home and car of a married couple suspected of running a drug smuggling operation.⁴⁰⁸ The Supreme Court declared that the review of such probable cause determinations should be "practical [and] nontechnical"⁴⁰⁹ in nature, and the affidavits should be examined using a "totality-of-the-circumstances" approach.⁴¹⁰ As a result, magistrates and judges making probable cause determinations enjoy a standard of review more deferential than the clearly erroneous standard afforded to fact-find-

401. *Id.* at 410, 712 A.2d 552-53 (Bell, C.J., dissenting) (internal quotation marks omitted) (quoting Court of Special Appeals decision in *Ward*).

402. *Ward*, 350 Md. at 375, 712 A.2d at 535.

403. *Id.*

404. *Id.*

405. 462 U.S. 213 (1983).

406. *Id.* at 236-39 (stressing that rigorous scrutiny of a magistrate's determination of probable cause conflicts with the preference afforded to searches carried out in accordance with a warrant (citing *Spinelli v. United States*, 393 U.S. 410, 419 (1969))); *see also infra* notes 414-416 and accompanying text (describing the preference given to searches conducted pursuant to a warrant).

407. *See Gates*, 462 U.S. at 238-39 (second alteration in original) (omission in original) (quoting *Jones v. United States*, 362 U.S. 257, 271 (1960)).

408. *See id.* at 225, 246.

409. *Id.* at 231 (quoting *Brinegar v. United States*, 338 U.S. 160, 176 (1949)).

410. *Id.* at 230. The court reasoned that, in making probable cause determinations "evidence . . . must be seen and weighed not in terms of library analysis by scholars, but as understood by those versed in the field of law enforcement." *Id.* at 232 (quoting *United States v. Cortez*, 449 U.S. 411, 418 (1981)).

ing judges or juries.⁴¹¹ The issue on appeal is not whether the underlying affidavit supplied probable cause, but rather, considering only the facts as set out in the officer's warrant,⁴¹² whether "such an inference would be permitted."⁴¹³

A second factor further insulates a magistrate's probable cause finding from appellate scrutiny. The Supreme Court has articulated a presumption in favor of searches made pursuant to a warrant, as opposed to warrantless searches.⁴¹⁴ The Court has stood firmly behind the notion that "doubtful or marginal cases . . . should be largely determined by the preference to be accorded to warrants."⁴¹⁵ This preferential treatment encourages "police officers [to] submit[] their evidence to a judicial officer before acting."⁴¹⁶ As a result of this presumption and the high standard of review described above, the decision of a warrant-issuing magistrate enjoys a large degree of deference when challenged in an appellate court.

b. The Nexus Requirement.—The Fourth Amendment provides that:

[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirma-

411. *State v. Amerman*, 84 Md. App. 461, 471-73, 581 A.2d 19, 24-25 (1990) (interpreting the "substantial basis" standard governing the probable cause determination to be a more deferential standard than the "clearly erroneous" standard that applies to fact-finding in a trial setting).

412. *See State v. Lee*, 330 Md. 320, 326, 624 A.2d 492, 495 (1993) ("In determining whether probable cause exists, the issuing judge or a magistrate is confined to the averments contained within the four corners of the search warrant application." (citing *Birchhead v. State*, 317 Md. 691, 700, 566 A.2d 488 (1989); *Valdez v. State*, 300 Md. 160, 168, 476 A.2d 1162 (1984))).

413. *Amerman*, 84 Md. App. at 463 n.1, 581 A.2d at 20 n.1 (internal quotation marks omitted) (quoting *Danz v. Schafer*, 47 Md. App. 51, 57-58, 422 A.2d 1 (1980)). In *Amerman*, the Court of Special Appeals described the subjective process of a probable cause determination as being "as much an art form as a mechanical exercise [that] relies necessarily upon the eye of the beholder." *Id.* at 463, 581 A.2d at 20. Accordingly, the court concluded that in making such determinations, "one judge may choose to draw a reasonable inference; another may as readily decline the inference; each will be correct and each is entitled, therefore, to the endorsement of a reviewing colleague." *Id.*

414. *United States v. Ventresca*, 380 U.S. 102, 106 (1965) ("[T]his Court, strongly supporting the preference to be accorded searches under a warrant, [has] indicated that in a doubtful or marginal case a search under a warrant may be sustainable where without one it would fall." (citing *Jones v. United States*, 362 U.S. 257, 270 (1960))).

415. *Id.* at 109 (citing *Jones*, 362 U.S. at 270).

416. *Id.* at 108.

tion, and particularly describing the place to be searched, and the persons or things to be seized.⁴¹⁷

Courts interpreting the Fourth Amendment have produced a broadly-formulated requirement that an underlying affidavit establish an adequate connection or nexus between the criminal activity, the place or person to be searched, and the items sought.⁴¹⁸ Such a connection is a necessary antecedent to any valid probable cause determination.⁴¹⁹ In addition, if a warrant authorizes a search for more than one place, or one place and one vehicle, the underlying affidavit must provide a factual basis connecting the crime, the items sought, and *each place* searched.⁴²⁰

Many complications can arise due to the various methods of determining if an affidavit provides a sufficient nexus between the place searched and items sought.⁴²¹ Direct observation of that connection renders the decision far easier, but such evidence is not always available.⁴²² As a result, magistrates must rely on reasonable inferences drawn from the facts contained in the affidavit.⁴²³

(1) *Residences and the Nexus Requirement.*—When the place to be searched is a residence, most reviewing courts operate under the

417. U.S. CONST. amend. IV.

418. 2 WAYNE R. LAFAYE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 3.7(d), at 372 (3d ed. 1996) (identifying the problems that occur regarding the nexus between place, items sought, and criminal activity).

419. *United States v. Charest*, 602 F.2d 1015, 1015-16 (1st Cir. 1979) (finding that a “warrant was invalid because the affidavit failed to supply a sufficient nexus between the firearm and [the] defendant’s premises”); 2 LAFAYE, *supra* note 418, § 3.7(d), at 372 (“[I]t is [] necessary that there be established a sufficient nexus between (1) criminal activity, and (2) the things to be seized, and (3) the place to be searched.”).

420. *See Porter v. United States*, 335 F.2d 602, 605 (9th Cir. 1964) (stating that, upon a showing of probable cause for all places to be searched, “the fact that a suspect has two automobiles, or two residences, does not mean that neither one of them can be searched, because the suspect may have concealed the wanted evidence in the other one”); *People v. Easley*, 671 P.2d 813, 820 (Cal. 1983) (explaining that a search warrant designating more than one person or place to be searched must contain sufficient probable cause to justify its issuance as to each person or place named therein); *Andresen v. State*, 24 Md. App. 128, 174, 331 A.2d 78, 106 (1975) (validating a single warrant that allowed an officer to search two places because “there was probable cause to believe that *some* of the evidence sought was in each of the two locations”).

421. *See* 2 LAFAYE, *supra* note 418, § 3.7(d), at 372-93.

422. *See United States v. Lucarz*, 430 F.2d 1051, 1055 (9th Cir. 1970) (stating that in the “normal search-and-seizure case” the nexus between the items to be seized and the place to be searched are based on direct observation).

423. *State v. Edwards*, 266 Md. 515, 517-19, 295 A.2d 465, 466-67 (1972) (asserting that a “judicial officer is entitled to draw reasonable inferences from the facts contained in the affidavit based on his experience in such matters” when making a probable cause determination (citing *Irby v. United States*, 314 F.2d 251, 253 (D.C. Cir. 1963))).

assumption that the home is a reasonable repository for incriminating evidence and therefore often conclude that sufficient nexus exists to search a home when an affidavit supplies enough facts to conclude that the defendant may be in possession of incriminative evidence. In *United States v. Lucarz*,⁴²⁴ the Ninth Circuit addressed the permissible range of such inferences. *Lucarz* involved a search of a home for money allegedly stolen from the United States Postal Service.⁴²⁵ The *Lucarz* court pointed specifically to several facts in the warrant: that the accused had "ample opportunity to make a trip home to hide the envelopes"; that the value and bulk of the things stolen lend themselves to concealment in the home; that the defendant had custody of the stolen mail; and that his explanation of the events in question was internally inconsistent and differed from those given by other witnesses.⁴²⁶ The court validated the inference that the defendant's home was a reasonable place to hide the stolen items.⁴²⁷ The court provided a list of bases for this inference including, but not limited to: "the type of crime, the nature of the missing items, the extent of the suspect's opportunity for concealment, and normal inferences as to where a criminal would be likely to hide stolen property."⁴²⁸ A string of cases from various federal circuits and state courts concur with the *Lucarz* court and have allowed magistrates to infer that a suspect who believes his identity to be unknown can reasonably be expected to hide a weapon or contraband in his residence.⁴²⁹

424. 430 F.2d 1051 (9th Cir. 1970).

425. *Id.* at 1052. The defendant was a postal employee accused of embezzling the proceeds of stamp sales. *Id.*

426. *Id.* at 1055.

427. *See id.*

428. *Id.* (citing *United States v. Teller*, 412 F.2d 374 (7th Cir. 1969); *Aron v. United States*, 382 F.2d 965 (8th Cir. 1967); *Anderson v. United States*, 344 F.2d 792 (10th Cir. 1965); *Porter v. United States*, 335 F.2d 602 (9th Cir. 1964)).

429. *See United States v. Jones*, 994 F.2d 1051, 1056 (3d Cir. 1993) ("[C]lothing and firearms[] are . . . the types of evidence likely to be kept in a suspect's residence." (citing *United States v. Jacobs*, 715 F.2d 1343 (9th Cir. 1983) (per curiam))); *United States v. Anderson*, 851 F.2d 727, 729 (4th Cir. 1988) (observing that the home is a place where a suspect would keep a gun he was trying to sell and listing cases that assert the reasonableness of the assumption that people keep guns in their homes); *State v. Couture*, 482 A.2d 300, 308-09 (Conn. 1984) (finding that "the magistrate could reasonably infer that the defendant believed his identity was unknown and that his house was at least temporarily a secure place in which to store the [stolen] money"); *Bollinger v. State*, 556 P.2d 1035, 1039 (Okla. Crim. App. 1976) (concluding that "[t]he trial court did not err in finding that probable cause existed to believe that" the clothing and weapon used in the crime were hidden in the defendant's home); *see 2 LaFAVE, supra* note 418, § 3.7(d), at 384 n.157 (citing authorities relying upon the inference that when the suspect believes his identity is unknown his residence is a logical place to search for instrumentalities of the crime or clothing worn during the commission of the crime).

Many decisions have explored the factors that aid reviewing courts in their determination of whether an affidavit adequately connected the items sought to the place searched. Courts often look to the proximity of the crime scene to the defendant's residence to aid them in determining if the affidavit properly connected the items sought to the suspect's home.⁴³⁰ The nature of the offense is another factor. For example, arson, robbery, and drug trafficking violations tend to involve tangible goods that a suspected perpetrator would likely keep at a residence.⁴³¹ In *United States v. Anderson*,⁴³² the Fourth Circuit Court of Appeals found that a weapon the defendant offered to sell could reasonably be expected to lie hidden in his residence.⁴³³ In *United States v. Jones*,⁴³⁴ the Third Circuit examined the validity of a warrant to search the residences of a group of robbery suspects who had recently spent large amounts of cash.⁴³⁵ The court operated under the assumption that the suspects would have likely kept the stolen cash in their homes.⁴³⁶ In so doing, the *Jones* court raised, but did not reach, the question "whether in every case the fact that a suspect committed a crime involving cash and/or a gun automatically provides a magistrate with enough information to approve a search of a

430. *Blount v. State*, 511 A.2d 1030, 1033 (Del. 1986) (sustaining a search warrant for a murder suspect's residence because "a reasonable magistrate could have concluded that the proximity of the defendant's residence to the crime scene could have rendered immediate disposition of the weapon more imprudent than retaining it").

431. See *United States v. Rambis*, 686 F.2d 620, 624 (7th Cir. 1982) ("The crime involved here, intended arson, required that a detonating device be assembled. A reasonable inference is that assembly of this device would require simple tools and materials commonly found in a home."); *Commonwealth v. Gannon*, 454 A.2d 561, 564 (Pa. Super. Ct. 1982) (affirming magistrate's conclusion that probable cause existed to search a residence for bank records and canceled checks providing evidence of theft of funds, as "it is only a matter of common sense to assume that the most likely place to find the bank records would be in [the suspect's] residence"); 2 LAFAYE, *supra* note 418, § 3.7(d), at 379 & n.145 (citing cases supporting the proposition that the absence of specific facts supporting the inference that a drug dealer keeps evidence of the crime in his home can be replaced by police "experience that drug dealers ordinarily keep their supply, records and monetary profits at home"); *id.* at 382 n.153 (citing cases supporting the inference that stolen property is likely to be found in the suspect's residence).

432. 851 F.2d 727 (4th Cir. 1988).

433. *Id.* at 729 ("It was reasonable for the magistrate to believe that the defendant's gun and the silencer would be found in his residence . . . even though the affidavit contained no facts that the weapons were located in [the] defendant's trailer . . .").

434. 994 F.2d 1051 (3d Cir. 1993).

435. *Id.* at 1055-58.

436. *Id.* at 1055-56 (noting that "cash is the type of loot that criminals seek to hide in secure places like their homes" (citing *United States v. Hendrix*, 752 F.2d 1226 (7th Cir. 1985); *United States v. Lucarz*, 430 F.2d 1051 (9th Cir. 1970))).

suspect's home."⁴³⁷ Additional facts in the affidavit spared the court from having to make such a broad ruling.⁴³⁸

Maryland case law contains examples of judicial officers using inferences instead of direct evidence to conclude that the requisite place-item nexus for a search warrant existed.⁴³⁹ Most influential among such inferences is the notion that suspects are likely to hide weapons or contraband in their homes. In *Mills v. State*,⁴⁴⁰ a rape case, the Court of Appeals based its approval of a magistrate's determination of probable cause on an affidavit with very few facts connecting the items sought to the suspect's residence.⁴⁴¹ The court affirmed the validity of the warrant based on an identification of the perpetrator, a detailed description of both the weapon used and the suspect's residence, and the fact that the suspect did not have the weapon on his person when he was apprehended.⁴⁴² The chief inference relied upon in *Mills* was that the "'assailant's house was a place where implements such as knives would ordinarily be kept.'"⁴⁴³

The First Circuit has rejected the proposition that a residence is a reasonable place to hide one type of incriminating evidence.⁴⁴⁴ In

437. *Id.* at 1056.

438. *Id.* (explaining that the presence of three newly-purchased motorcycles parked in front of one suspect's residence was an additional factor allowing the magistrate to conclude that evidence of wrongdoing could be found inside).

439. See *Grimm v. State*, 6 Md. App. 321, 328, 251 A.2d 230, 235 (1969) (upholding a search warrant for a trailer belonging to one of the two men suspected of killing a cab driver based on the inferences that "the guns had been carried away from the scene of the crime by the perpetrators," and that the men had carried the guns to the trailer where one of them resided).

It is worth noting that federal cases interpreting the Fourth Amendment are often cited by the Maryland appellate courts. The Court of Appeals of Maryland has emphasized that "in considering [Maryland State's] constitution and statutes relating to the subject of unlawful searches and the admissibility of evidence thereby obtained, 'decisions of the Supreme Court on the kindred 4th Amendment are entitled to great respect.'" *Givner v. State*, 210 Md. 484, 498, 124 A.2d 764, 771 (1956) (discussing the effect of Supreme Court decisions on state search and seizure law (quoting *Lambert v. State*, 196 Md. 57, 62, 75 A.2d 327, 329 (1950))).

440. 278 Md. 262, 363 A.2d 491 (1976).

441. See *id.* at 276-80, 363 A.2d at 499-501 (quoting from the affidavit submitted to obtain a search warrant for the defendant's residence).

442. *Id.* at 276, 363 A.2d at 499. In a subsequent case, *Mills* was parenthetically described by the Court of Appeals as "upholding [a] warrant based on police allegation of a crime, knowledge of the suspect's address, [a] detailed description of the weapon and [the] absence of [the] weapon on suspect at time of arrest." *Malcolm v. State*, 314 Md. 221, 233, 550 A.2d 670, 676 (1988).

443. *Mills*, 278 Md. at 278, 363 A.2d at 500 (quoting *Vessels v. Estelle*, 376 F. Supp. 1303, 1309 (S.D. Tex. 1973), *aff'd*, 494 F.2d 1295 (5th Cir. 1974)).

444. See *United States v. Charest*, 602 F.2d 1015, 1017 (1st Cir. 1979) ("Common sense tells us that it is unlikely that a murderer would hide in his own home a gun used to shoot someone.").

United States v. Charest,⁴⁴⁵ the court instead assumed that the defendant would more likely take measures to dispose of the weapon.⁴⁴⁶ The court further observed that the gun “could easily have been disposed of within a short time after the crime.” Since the affidavit contained no other facts linking the defendant’s home directly to the weapon, the court found the search invalid and suppressed the seized evidence.⁴⁴⁷

(2) *Automobiles and the Nexus Requirement.*—The decisions involving the sufficiency of a warrant allowing the search of a vehicle are relatively few in number.⁴⁴⁸ This number becomes even smaller when narrowed solely to include the issue of sufficient nexus. When a warrant permits the search of an automobile, a magistrate may be compelled to rely on a different set of inferences in order to conclude that there is a sufficient nexus between the items sought and the automobile in question.⁴⁴⁹ The cases examined above predominantly base their nexus determinations on the suspect’s tendency to hide incriminating evidence in his or her residence.⁴⁵⁰ The logical implication is that a home offers a secure place where one can expect a high degree of privacy from intrusion.⁴⁵¹ It is well established that a person enjoys a lower expectation of privacy in an automobile, as compared with a residence.⁴⁵² As such, it would be far less likely for a suspect to hide potentially incriminating evidence in a car, as opposed to a home,

445. 602 F.2d 1015 (1st Cir. 1979).

446. *Id.* at 1017.

447. *Id.*

448. See 2 LAFAVE, *supra* note 418, § 2.5(d), at 538 (noting that “because it is ordinarily permissible to conduct a warrantless search of an automobile,” few appellate decisions deal with warrants to search an automobile).

449. See *id.*, § 3.7(d), at 384 n.157 (“If the place to be searched is a vehicle rather than a residence, additional difficulties [in providing nexus] may be encountered.” (citing *Commonwealth v. Moon*, 405 N.E.2d 947 (Mass. 1980))).

450. See *supra* notes 424-443 and accompanying text (discussing the common judicial assumption that the home is a reasonable repository for incriminating evidence).

451. See *Payton v. New York*, 445 U.S. 573, 589 (1979) (“The Fourth Amendment protects the individual’s privacy in a variety of settings[, yet] [i]n none is the zone of privacy more clearly defined than when bounded by the unambiguous physical dimensions of an individual’s home.”).

452. See *South Dakota v. Opperman*, 428 U.S. 364, 367-68 (1976) (discussing the traditional distinction drawn between automobiles and residences in relation to the Fourth Amendment and asserting that “warrantless examinations of automobiles have been upheld in circumstances in which a search of a home or office would not” (citing *Cardwell v. Lewis*, 417 U.S. 583, 589 (1974); *Cady v. Dombrowski*, 413 U.S. 433, 439-40 (1973); *Chambers v. Maroney*, 399 U.S. 42, 48 (1970))).

since the latter is more protected from intrusion.⁴⁵³ Maryland courts have specifically recognized that a lesser expectation of privacy attaches to a vehicle, as opposed to a residence.⁴⁵⁴ In the name of logical consistency, that reduced expectation of privacy should cause a criminal to be reluctant to store incriminating evidence in his vehicle.⁴⁵⁵ As a result, it is not reasonable to place automobiles on a par with residences as places where a suspect would hide incriminating evidence.⁴⁵⁶

Accordingly, courts rely on other factors to conclude that a sufficient nexus exists between an automobile and an item sought to permit a search of the car. One such factor is the possibility that the car was somehow used in the commission of the crime in question. Courts allow the search of an automobile if the affidavit shows that it was the only means of transporting the contraband. In *United States v. Christenson*,⁴⁵⁷ the Eighth Circuit upheld a search of a Ford Falcon allegedly used for the commission of three burglaries all within a few hours of each other.⁴⁵⁸ The court held it reasonable to infer that the stolen items could be found in the "only apparent means of transportation available to [the defendant]"⁴⁵⁹ and therefore concluded that the required connection between the contraband sought and the place searched existed.⁴⁶⁰ Courts will point to a variety of factors which can link an automobile to evidence of wrongdoing.⁴⁶¹

453. See *State v. Metzner*, 338 N.W.2d 799, 805 (N.D. 1983) ("[A] convicted felon would more logically secrete a rifle in his house than in his car which carries a considerably diminished expectation of privacy").

454. See *Dyson v. State*, 122 Md. App. 413, 423-24, 712 A.2d 573, 578 (1998) (noting that warrantless searches of automobiles are allowable in large part because of "the ready mobility of the automobile" and "the risk of imminent disappearance of the automobile" and its "probable evidentiary contents" if an officer is forced to leave the automobile to obtain a warrant), *cert. denied*, 351 Md. 287, 718 A.2d 235 (1998); *Jones v. State*, 111 Md. App. 456, 467-68, 681 A.2d 1190, 1196 (1996) ("[T]he expectation of privacy associated with a car is less than that associated with a home or office." (citing *Carroll v. United States*, 276 U.S. 132 (1925))).

455. See *Metzner*, 338 N.W.2d at 805 (acknowledging that a convicted felon would be less likely to hide a gun in his automobile than in his house due to the lesser expectation of privacy that attaches to the former).

456. See *id.*

457. 549 F.2d 53 (8th Cir. 1977).

458. *Id.* at 56.

459. *Id.* at 57.

460. See *id.* ("[T]here existed a justifiable nexus between the burglaries and the Ford Falcon.").

461. See *United States v. Morris*, 647 F.2d 568, 573 (5th Cir. 1981) (approving the issuance of a warrant to search a car based partially on eyewitness testimony in the affidavit labelling defendant's vehicle as the "getaway car"); *State v. Iverson*, 187 N.W.2d 1, 28 (N.D. 1971) (counting the fact "that [the defendant] drove a cab and would on occasion give [the murder victim] a ride to work" among the factors allowing the issuance of a warrant

Some courts will make more subtle nexus inferences. For example, the California Supreme Court approved the search of two cars when one had been recently purchased, and the suspect was an out-of-county resident whose fingerprints placed him at the crime scene.⁴⁶²

3. *The Court's Reasoning.*—In *State v. Ward*, the Court of Appeals ruled that the affidavit supporting the search warrant provided the magistrate with a sufficient factual basis to connect the evidence sought to Ward's home and automobile, and as a result, probable cause existed to search both.⁴⁶³ After detailing the procedural history,⁴⁶⁴ the court discussed the standard of review applicable to a magistrate's determination of probable cause.⁴⁶⁵ The court stressed that the Supreme Court has directed appellate courts to review affidavits in a "commonsense and realistic fashion" because "[t]hey are normally drafted by non-lawyers in the midst and haste of a criminal investigation."⁴⁶⁶

The court then turned its attention to the underlying affidavit⁴⁶⁷ and the inferences a magistrate could have drawn based on the facts detailed in that affidavit.⁴⁶⁸ The majority first found that the murder victim was "gunned down on [a] public street."⁴⁶⁹ Second, the anonymity of the tips accusing Ward, combined with Ward's arrest record, permitted the magistrate to infer that the informants feared Ward and

for the defendant's vehicle in the absence of direct evidence that incriminating evidence was located in the vehicle); *State v. Higginbotham*, 471 N.W.2d 24, 31-32 (Wis. 1991) (allowing the search of an accused arsonist's automobile in part because the victim saw a car driving slowly in front of the crime scene after the arson was discovered).

462. See *People v. Easley*, 671 P.2d 813, 819-20 (Cal. 1983) (naming the recent purchase of an automobile, following a suspected contract killing, as one of the facts allowing the issuance of a search warrant for that car).

463. *Ward*, 350 Md. at 374, 712 A.2d at 534.

464. See *supra* notes 392-403 and accompanying text (describing the procedural history of *Ward*).

465. See *Ward*, 350 Md. at 376, 712 A.2d at 536.

466. *Id.* (quoting *United States v. Ventresca*, 380 U.S. 102, 108 (1965)).

467. See *id.* at 376-77, 712 A.2d at 536 (examining the affidavit and discussing the facts giving rise to permissible inferences).

468. See *id.* The following is a list of facts discussed by the majority opinion in developing the chain of inferences. First, Stewart's body was found in the street at the 1400 block of Cliftview Avenue in Baltimore City. *Id.* Second, the tips which led to Ward's custodial interrogation were anonymous. *Id.* at 377, 712 A.2d at 536. Third, Ward had a history of prior arrests for handgun violations. *Id.* Fourth, the murder weapon was not found at the crime scene. *Id.* Fifth, an eyewitness identified Ward as Stewart's killer. *Id.* at 374, 712 A.2d at 535. Sixth, Ward had been stopped by the police while in or about his vehicle. *Id.* at 377, 712 A.2d at 536. Lastly, Ward's address was also given in the affidavit. *Id.* at 375, 712 A.2d at 535.

469. *Id.* at 376-77, 712 A.2d at 536.

that this fear rendered them unwilling to identify themselves.⁴⁷⁰ Third, the court noted that the manner in which the "affidavit described Ward" as a man with a history of handgun arrests and the ability to create fear-inspired anonymity, revealed that he is the type of person to whom a gun was "of utility and value."⁴⁷¹ Therefore, the court inferred that Ward had not, and would not, discard the murder weapon or "the weapon's less incriminating bullets."⁴⁷² Fourth, the fact that the gun was not recovered allowed the inference that it was neither on Ward's person when he was apprehended, nor was it in plain view in his vehicle.⁴⁷³ Finally, the magistrate could infer that Ward had used his automobile within two days of the commission of the murder by the fact that the police towed the automobile to police headquarters⁴⁷⁴ when they brought Ward into custody for questioning.⁴⁷⁵ Based on this chain of inferences, the majority concluded that "the magistrate had probable cause to believe that the murder weapon and associated evidence . . . could be found in Ward's home and/or in his automobile, but out of view."⁴⁷⁶

a. Nexus Between the Items Sought and Ward's Residence.—The court devoted the remainder of the opinion to an examination of the case law governing the nexus requirement.⁴⁷⁷ The court began by analyzing the nexus requirement needed to support the search of Ward's residence,⁴⁷⁸ and found its previous decision in *Mills v. State*⁴⁷⁹ supportive of its conclusion that the magistrate had probable cause to issue a warrant to search Ward's residence.⁴⁸⁰ According to the *Ward* court, there was "no substantial difference between" the circumstances of the instant case and *Mills*.⁴⁸¹ In *Mills*, the Court of Appeals upheld a warrant to search a suspect's residence based upon an affidavit "describ[ing] in detail the offense, the arrest of [the suspect], the

470. *Id.* at 377, 712 A.2d at 536.

471. *Id.*

472. *Id.*

473. *Id.*

474. *Id.*

475. *Id.*

476. *Id.* at 377-78, 712 A.2d at 536.

477. *Id.* at 378-89, 712 A.2d at 536-42.

478. *Id.* at 377, 712 A.2d at 536.

479. 278 Md. 262, 363 A.2d 491 (1976) (finding probable cause to search a suspect's residence for a hunting knife and sheath used in the commission of a kidnapping, robbery and rape although the affidavit contained no direct evidence establishing a nexus); *see also supra* notes 440-443 (discussing the probable cause determination made in *Mills v. State*).

480. *Ward*, 350 Md. at 378-79, 712 A.2d at 536.

481. *Id.* at 379, 712 A.2d at 537.

[weapon], and the place to be searched.”⁴⁸² As in *Ward*, the only evidence linking the weapon sought in *Mills* to the suspect’s residence was the fact that the suspect, when arrested, did not physically possess a weapon similar to the one used in the crime.⁴⁸³ The majority further examined the reasoning in several other cases that drew inferences similar to those drawn in *Mills*.⁴⁸⁴

The court continued its nexus analysis of the warrant, in relation to the search of Ward’s residence, by explaining that “geographical” inferences may be drawn to illustrate that a suspect would likely return to his or her residence following the commission of a crime.⁴⁸⁵ The court noted that Baltimore street maps indicate that Ward’s residence was located only one block from the crime scene.⁴⁸⁶ From the proximity of Ward’s residence to the scene of the murder, the majority reasoned that a magistrate could have concluded that Ward had taken the weapon home, rather than disposing of it.⁴⁸⁷

The court ended its discussion of Ward’s residence by recognizing precedent contrary to the above discussion.⁴⁸⁸ The court focused on *United States v. Charest*,⁴⁸⁹ a First Circuit Court of Appeals opinion which relied on the inference that a residence is an unlikely place for

482. *Id.*; see also *Mills*, 278 Md. at 276, 363 A.2d at 499.

483. *Ward*, 350 Md. at 379, 712 A.2d at 537 (citing *Mills*, 278 Md. at 276, 363 A.2d at 499).

484. Among the authorities cited by the court were *State v. Couture*, 482 A.2d 300, 309 (Conn. 1984) (finding probable cause to issue a search warrant for a murder weapon where “the magistrate could reasonably infer that the defendant believed his identity was unknown and that his house was at least temporarily a secure place” to store the money and hide the weapon), *Blount v. State*, 511 A.2d 1030, 1033 (Del. 1986) (sustaining a search warrant for a murder suspect’s residence because his “residence would be a logical place to search for the weapon and clothing used in the crime” (quoting *Hooks v. State*, 416 A.2d 189, 203 (Del. 1980))), and *Bollinger v. State*, 556 P.2d 1035, 1039 (Okla. Crim. App. 1976) (“[T]he logical inference is that a criminal [accused of assault and battery with a deadly weapon with intent to kill], who believes his identity has been concealed, would return his clothing and property to his home.”).

485. See *Ward*, 350 Md. at 383, 712 A.2d at 539.

486. *Id.* (“Standard Baltimore City street maps reflect that Darley Avenue, where Ward resided at No. 1634, is parallel to, and one block away from, Cliftview Avenue, on which the murder occurred in the 1400 block.”).

487. *Id.* In *Blount v. State*, 511 A.2d 1030 (Del. 1986), the Delaware Supreme Court utilized this approach as well, finding that a reasonable magistrate could conclude that the proximity of a defendant’s residence to the crime scene may render immediate disposition of the weapon more imprudent than retaining it. *Id.* at 1033; see also *supra* note 430.

488. *Ward*, 350 Md. at 384-85, 712 A.2d at 540.

489. 602 F.2d 1015, 1017 (1st Cir. 1979) (refusing to find probable cause to search a defendant’s home for the murder weapon because “[i]t is not reasonable to infer that [the] defendant drove [home from the crime scene] and then casually placed a weapon which had fired more than one bullet into a man on the shelf in his bedroom closet”).

a suspect to hide a gun.⁴⁹⁰ The court concluded, however, that *Charest* is overshadowed by more persuasive precedent in the Fourth Circuit recognizing the validity of the criminal's tendency to hide contraband in his or her home.⁴⁹¹

b. Probable Cause to Search Ward's Vehicle.—The majority then turned its attention to the probable cause determination linking Ward's automobile to the weapon and ammunition used in the murder of Alfred Stewart.⁴⁹² The court began its analysis with a proclamation that the search of the vehicle was upheld by "[t]he same probable cause that supported issuance of the search warrant" for Ward's residence.⁴⁹³ In order to buttress this position, the court argued that a single affidavit may provide probable cause to search more than one place.⁴⁹⁴ The court listed several cases that stand for this proposition.⁴⁹⁵ In each case, Judge Rodowsky explained that the affidavit provided the requisite nexus between the items sought and the vehicles searched.⁴⁹⁶ The court finished its discussion of the applicable law by citing several cases involving warrants for both a residence and a vehicle in which the vehicle was used in leaving the scene of the accident.⁴⁹⁷ The court then concluded that the fact that Ward had operated his car two days after the crime and that weapons and ammunition were items of "continuing utility and value" enabled the magistrate to conclude that probable cause existed to search his vehicle.⁴⁹⁸

490. *Id.* ("Common sense tells us that it is unlikely that a murderer would hide in his own home a gun used to shoot someone.").

491. *Id.* at 385-86, 712 A.2d at 540 (citing *United States v. Anderson*, 851 F.2d 727, 729 (4th Cir. 1988)).

492. *Id.* at 386, 712 A.2d at 540-41.

493. *Id.*, 712 A.2d at 540.

494. *Id.*, 712 A.2d at 541 (explaining that "[i]t is permissible to have a single warrant authorize search of a . . . described place and a described automobile. . ." (quoting 2 LaFAVE, *supra* note 418, § 4.5(c), at 535)).

495. *Id.* at 385-89, 712 A.2d at 541-42. In support of the rule allowing a single affidavit to authorize the search of multiple places, the court cited *Vessels v. Estelle*, 376 F. Supp. 1303, 1309 (S.D. Tex. 1973) (upholding a warrant that authorized the search of both the suspect's residence and automobile), *aff'd*, 494 F.2d 1295 (5th Cir. 1974), *People v. Easley*, 671 P.2d 813, 820 (Cal. 1983) (rejecting the defendant's theory that a "warrant which authorizes the search of more than one location for the same property is per se invalid"), and *Williams v. State*, 240 P.2d 1132, 1135, 1137-39 (Okla. Crim. App. 1952) (sustaining the search of four places under a single warrant).

496. *See Ward*, 350 Md. at 386-89, 712 A.2d at 541-42.

497. *Id.* at 388-89, 712 A.2d at 542 (pointing out that the fact that the vehicle was seen leaving the scene was not the "threshold of validity").

498. *Id.* at 389, 712 A.2d at 542.

c. *The Dissent*.—Chief Judge Bell wrote a visceral dissent joined by Judges Eldridge and Wilner. The dissent begins with an explanation of the facts,⁴⁹⁹ followed by a criticism of the inferences the majority drew from those facts, which Judge Bell described as unsubstantiated “bald assumptions.”⁵⁰⁰ The dissent explains the historical derivations of the prohibition against unreasonable searches and seizures, including in that history a careful explanation of probable cause, the standard of review, and the nexus requirement.⁵⁰¹ The dissent then turns its attention to the particular analysis employed by the majority and, one-by-one, distinguishes or criticizes the decisions upon which Judge Rodowsky bases his opinion.⁵⁰² The dissent focused its ire on the fact that the majority failed to cite murder cases in support of its conclusion.⁵⁰³ The dissent argued that cases involving other types of criminal activity are far more likely to produce contraband which would be stored in the perpetrator’s home.⁵⁰⁴ In a robbery case, for example, the dissent explained that “one may legitimately infer that he or she will keep the proceeds; that after all is the only point of the endeavor.”⁵⁰⁵ The dissent pointed out that the crime of murder does not lend itself to such inferences.⁵⁰⁶ The dissent’s most vehement protest is its conclusion that the nexus requirement has been abandoned.⁵⁰⁷ The dissent complained that even the cases the majority relied upon had at least applied the correct test for determining if a warrant supplies adequate nexus.⁵⁰⁸ The dissent concludes that, as a result of its errors in choosing and applying the law of the Fourth Amendment nexus requirement, the majority has determined:

probable cause automatically will exist sufficient for the issuance of a search warrant for both the residence and vehicle of a suspect in a criminal investigation, whenever the instru-

499. *Id.* at 391-94, 712 A.2d 543-45 (Bell, C.J., dissenting).

500. *Id.* at 392, 712 A.2d at 544.

501. *Id.* at 394-401, 712 A.2d 545-48.

502. *See id.* at 401-05, 712 A.2d 548-50 (focusing its disagreement on the majority’s use of *Mills v. State*, 278 Md. 262, 363 A.2d 491 (1976), and other cases not involving the crime of murder).

503. *Id.* at 404, 712 A.2d at 549.

504. *Id.*, 712 A.2d at 550.

505. *Id.*

506. *Id.*

507. *Id.* at 390, 712 A.2d at 543 (arguing that the majority opinion “abrogates the requirement that . . . the affiant establish a reasonable nexus between the items sought by the warrant and the premises or places to be searched”).

508. *Id.* at 403, 712 A.2d at 549 (“*Mills* may actually have applied, albeit incorrectly, in my view, the proper nexus standard[.]”).

mentality of the crime or key evidence relating to it is not found on that suspect when he or she is questioned or arrested.⁵⁰⁹

4. *Analysis.*—

a. *The Court Accurately Affirmed That Probable Cause Existed to Search Ward's Residence.*—The majority's conclusion that the affidavit supplied the magistrate with a sufficient nexus between the items sought and Ward's home⁵¹⁰ is a solid, albeit unremarkable, example of decision-making. It falls in line with the nexus principles of Maryland, most federal circuits, and many states.⁵¹¹ As reasoned in the opinions cited by the majority, the nexus between the items sought and Ward's residence can be provided in large part by the fact that his home was a reasonable place to hide such evidence.⁵¹² Alone, the inference that a home is a reasonable place to hide a weapon would not have been enough. The majority makes this clear by not endorsing the bright line rule suggested in *United States v. Jones*.⁵¹³ Instead, the majority correctly points to other factors linking Ward's home with the crime and holds that those factors serve to complete the necessary connection between the place searched and the evidence sought.⁵¹⁴ As a result, the *Ward* decision does not navigate Maryland into uncharted Fourth Amendment waters with respect to probable cause determinations for residences.

The majority stayed within the boundaries established by case law which hold that one's residence is a normal place to hide a weapon,

509. *Id.* at 391, 712 A.2d at 543.

510. *Ward*, 350 Md. at 378-79, 712 A.2d at 536-37.

511. *Id.* at 379-86, 712 A.2d at 537-40; *see also supra* notes 424-443 and accompanying text (discussing case law from Maryland and other state and federal jurisdictions that have considered the nexus requirement in relation to the search of residences).

512. *Ward*, 350 Md. at 379-80, 712 A.2d at 537-40; *see also supra* notes 479-485 and accompanying text (discussing case law cited by the *Ward* court in support of its holding that there was a sufficient nexus between the items sought and the residence searched in the instant case).

513. 994 F.2d 1051, 1056 (3d Cir. 1993) (declining to decide the validity of a per se rule in which the required nexus between the item sought and the defendant's residence would always be established when a suspect commits a crime involving cash or a firearm).

514. *Ward*, 350 Md. at 376-77, 383-84, 712 A.2d at 536, 539. Those factors included the proximity of Ward's house to the crime scene, the fact that the gun was an item of continuing utility and value, and the fact that Ward could have believed that there were no witnesses to the shooting who would report or identify him. *Id.*

especially when the suspect operates under the belief that she was not observed while executing the crime.⁵¹⁵

In fact, the majority in *Ward* had more facts tying the weapon to the place searched than it did in *Mills v. State*.⁵¹⁶ In *Mills*, the court did not rely on the inferences that the suspect believed his identity to be a secret or that his prior arrest record showed any particular reason for him to maintain possession of the knife after the crime.⁵¹⁷ Indeed, the affidavit in *Mills* contained nothing connecting the knife to the defendant's home except for the facts that he lived in close proximity to the area where the victims were kidnapped, he had been identified by the victims, and that he was arrested without the knife on his person a short time after the crime was committed.⁵¹⁸ Nevertheless, the *Mills* court—without detailing the extent of the permitted inferences—held that the underlying affidavit supplied enough information to find a nexus.⁵¹⁹ If anything, it was *Mills*, not *Ward*, that—as the dissent complains—had:

[t]he natural and certain consequence . . . that probable cause automatically will exist sufficient for the issuance of a search warrant for the residence . . . of a suspect in a criminal investigation whenever the instrumentality of the crime or key evidence relating to it is not found on [the] suspect when he or she is questioned or arrested.⁵²⁰

The *Ward* majority based its assumptions on additional facts that were not present in the *Mills* affidavit.⁵²¹ Thus, the majority steered its holding well within the course charted by previous decisions discussing the nexus issues.

515. See *supra* notes 439-443 and accompanying text (examining the notion that suspects are likely to hide weapons or contraband in their homes).

516. 278 Md. 262, 363 A.2d 491 (1976). For a general discussion of *Mills*, see *supra* notes 440-443 and accompanying text. For a comparison of *Mills* and *Ward*, see *supra* notes 479-484 and accompanying text.

517. *Mills*, 278 Md. at 276, 363 A.2d at 499. Quite to the contrary, the suspect in *Mills* showed the victims off to several of his friends before releasing them. *Mills v. State*, 28 Md. App. 300, 301, 345 A.2d 127, 128 (1975), *aff'd*, 278 Md. 262, 363 A.2d 491 (1976).

518. See *Mills*, 278 Md. at 276, 363 A.2d at 499 (offering a description of the facts as laid out in the affidavit).

519. See *id.* at 280, 363 A.2d 501 (concluding that "Mills' home was a probable place for secreting objects such as a hunting knife and a sheath").

520. *Ward*, 350 Md. at 390, 712 A.2d at 543 (Bell, C.J., dissenting). This, of course, is the bright line rule raised in *United States v. Jones*, 994 F.2d 1051 (3d Cir. 1993), which would hold that a sufficient nexus will automatically exist between a suspect's home and the items sought whenever the crime involves stolen goods and/or a weapon. *Id.* at 1056.

521. See *supra* notes 467-476 and accompanying text (outlining the factual basis upon which the majority could begin to outline permissible inferences).

b. *The Majority Needed More Evidence to Affirm the Search of Ward's Automobile.*—The majority does, however, drift off course in its analysis, reasoning, and conclusion regarding the validity of the search warrant for Ward's car. The court concluded that "the same probable cause that supported" the search warrant of Ward's house, supported the search warrant for his car.⁵²² The majority based its nexus determination for Ward's house primarily on the inference, supported by ample case law, that a suspect will likely hide a weapon in his home.⁵²³ Yet, this body of law does not support the same inference for hiding a weapon or ammunition in a car. On the contrary, the notion that a suspect would hide a weapon at home militates sharply against the idea that a car is also a safe hiding place. Homes are places to which the law grants protection;⁵²⁴ cars are not.⁵²⁵ As such, it would not have been reasonable or likely for Ward to have hidden such evidence in his car. Simply put, the same factors making it likely that Ward hid his gun in his home render it unlikely that he hid the gun in his car.

Unlike the support it drew from *Mills* for the search of Ward's house, the majority cannot point to a single decision that provides a basis for searching a car with so little factual grounding. Nor does such a precedent exist. The majority authorized a search of the car based on the fact that Ward's car was towed to the station two days after the murder occurred.⁵²⁶ No other facts in the affidavit implicate the car.

The other factors the majority used to uphold the search of Ward's house similarly do not apply to the vehicle. In fact, those details further indicate that Ward would not have used his car in the commission of the crime in question.⁵²⁷ For example, in the section

522. *Ward*, 350 Md. at 386, 712 A.2d at 540.

523. *See id.* at 378-86, 712 A.2d at 537-40.

524. *See Payton v. New York*, 445 U.S. 573, 589-90 (1980) (explaining that "[a]t the very core [of the Fourth Amendment] stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion" (alterations in original) (quoting *Silverman v. United States*, 365 U.S. 505, 511 (1961))).

525. *See supra* notes 452-454 and accompanying text (pointing out the decreased privacy interest an individual has in an automobile).

526. *See Ward*, 350 Md. at 389, 712 A.2d at 542 (stating that "we are informed by the affidavit that Ward was operating his car within forty-eight hours after the murder"). Yet, the affidavit does not explicitly say that Ward was "operating" his car. *Id.* at 375 n.2, 712 A.2d at 535 n.2 (providing the text of the relevant portions of the affidavit). Rather, the document merely states that the car was brought to the station with Ward and that it had expired tags. *Id.* It seems that the majority inferred that Ward was operating the car, without labeling its conclusion as an inference.

527. *Compare United States v. Christenson*, 549 F.2d 53, 56 (8th Cir. 1977) (approving the inference that evidence would be found in the car of defendant who had allegedly

of the opinion devoted to discussing the search of Ward's residence, the majority gave heed to the fact that Ward's home was located within a few blocks of the scene of the crime.⁵²⁸ Yet this same proximity illustrates that it is unlikely that Ward would have traveled to the murder scene by car. As such, this case is distinguishable from cases in which the use of a car in the commission of the crime supplied the required nexus between the car and the item sought.⁵²⁹ The use of a car is unlikely when the defendant lives but a few blocks from the crime scene.

A close examination of the court's reasoning reveals the origin of its error. The court skipped a critical step in finding legal support for its conclusion. The majority focused its defense of the automobile search by listing a series of cases that allow the search of multiple places.⁵³⁰ After detailing the fact patterns found in those decisions, the majority concluded that the affidavit in *Ward* also validly allowed a multi-place search.⁵³¹ The court jumped inappropriately from the discussion of multiple-place affidavits to the final nexus determination made on the *Ward* affidavit by the magistrate.⁵³² Thus, the court failed to cite a single analogous precedent that buttressed its analysis regarding the search of Ward's automobile. The majority reached its decision without any sign that it considered whether the magistrate's determination in *Ward* was analogous to similar determinations made by other courts.

Furthermore, the cases cited by the majority differ demonstrably with respect to the facts that would enable a magistrate to conclude that a sufficient nexus exists to issue a warrant. The court did cite three cases where the "affidavit ha[d] indicated that the vehicle may

committed three robberies within a few hours of each other and hence would have needed the car to travel among the crime scenes).

528. See *Ward*, 350 Md. at 383, 712 A.2d at 539 (discussing cases where geographical proximity played a role in the magistrate's determination of probable cause). A "standard street map" of the neighborhood in question reveals that Clifton Avenue and Darley Avenue run parallel to each other, one block apart. *Id.* The affidavit revealed that Ward lived at 1634 Darley Avenue and that the murder had occurred at 1400 Clifton Avenue. *Id.* The distance between the two locations could not have been more than three blocks.

529. See *supra* note 470 and accompanying text and notes 457-461 and accompanying text.

530. See *Ward*, 350 Md. at 386-89, 712 A.2d at 540-42; see also *supra* notes 494-496 and accompanying text (citing various cases for the proposition that a single affidavit can provide probable cause for the search of multiple places).

531. See *Ward*, 350 Md. at 386-89, 712 A.2d at 540-42.

532. See *id.*

have been used in leaving the scene of the crime.”⁵³³ Although that detail was not dispositive by itself, it was a factor that those courts considered in finding that the car was sufficiently linked to the crime for probable cause purposes.⁵³⁴ The majority in *Ward* invoked no similar detail tending to show that the car may have been used. In spite of the lack of analogous precedent, the majority still concluded that the affidavit in question provided probable cause to search Ward’s Oldsmobile.⁵³⁵

Still other facts in the affidavit render it even less likely that Ward would have hidden incriminating evidence in his Oldsmobile. The affidavit notes that the police detained Ward’s automobile because it had expired tags,⁵³⁶ as a result, it was “subject to towing under statutory law.”⁵³⁷ It is clear enough that a car is a less reliable hiding place than a house; a car with expired tags is a virtual invitation of police scrutiny. Such a fact renders it even less likely that Ward would have hidden a weapon in his car, and therefore—following the majority’s reasoning⁵³⁸—it should be less likely that the affidavit detailed a connection between the items sought and the automobile.

While, as the dissent mistakenly laments, the majority has not produced the end of the nexus requirement, it has broken new ground with respect to establishing probable cause to search a car. As noted previously, the majority’s ruling with respect to the finding that the affidavit sufficiently connected the items sought to Ward’s home fell within the scope of previous decisions.⁵³⁹ As such, the dissent is

533. *Id.* at 389, 712 A.2d at 542 (citing *United States v. Morris*, 647 F.2d 568 (5th Cir. 1981); *State v. Iverson*, 187 N.W.2d 1 (N.D. 1971); *State v. Higginbotham*, 471 N.W.2d 24 (Wis. 1991)).

534. *Id.*

535. *Id.* One must be careful to distinguish between the possibility that an affidavit can lay out the basis for a search of two different places and the question whether the affidavit did in fact do so. If the majority allows a magistrate to draw a geographical inference from the fact that the suspect’s residence is a few blocks from the murder scene, it cannot rely on precedent that allowed the search of a car based in part on the opposite geographical inference. This is logically inconsistent. It does not dispute the premise that an affidavit could provide probable cause to search more than one place.

536. *Id.* at 375 n.2, 712 A.2d at 535 n.2.

537. Brief of Respondent at 9, *State v. Ward*, 350 Md. 372, 712 A.2d 534 (1998) (No. 35).

538. Once again, this sentence refers to the majority’s reliance on the notion that a suspect’s home is a reasonable place to hide contraband. See *Ward*, 350 Md. at 378-86, 712 A.2d at 536-40; see also *supra* notes 476-490 and accompanying text.

539. See *supra* notes 510-521 and accompanying text (explaining that the *Ward* court’s finding of a sufficient nexus between Ward’s residence and the evidence sought fell within the boundaries of Maryland precedent).

misguided in its conclusion that *Ward* abrogates the nexus requirement.⁵⁴⁰

While the nexus requirement remains for residences, it is now likely that anytime an officer can provide the required nexus to link an item to a residence, probable cause will also exist to search the suspect's car. The court has erased the difference between the character of a home and that of car with respect to a suspect's propensity to regard a car as a less reliable repository. Under this construction, all of the precedent cited by the majority in support of a defendant's tendency to hide items in his or her house also extends to any car used within two days of the offense.⁵⁴¹

5. *Conclusion.*—The *Ward* decision opens the door to searches of many automobiles that, barring the fact that their owners have a residence subject to search, should not be searched at all. By approving an affidavit which literally offered no evidence linking the car in question with the instrumentalities of the crime, the majority felt obliged to lump the car and house together and drew inferences about automobiles that run contrary to well-established Fourth Amendment analysis.

DENIS C. MITCHELL

D. Police Searches of Children's Belongings Conducted Pursuant to Parental Consent

In *In re Tariq A-R-Y*,⁵⁴² the Court of Appeals addressed the validity of a police search of a minor child's jacket left in the family dining room, conducted pursuant to parental consent, over the objection of the child.⁵⁴³ The court held the search valid, reasoning that the child, by leaving his vest in a common area of the house, assumed the risk that his mother would consent to the search.⁵⁴⁴ In reaching its holding, the court relied on two factors. First, the mother's superior authority over the premises gave her the authority to consent to a search

540. *Ward*, 350 Md. at 390, 712 A.2d at 543 (Bell, C.J., dissenting).

541. In addition, the majority's reasoning could allow a crafty defense attorney to argue that an automobile is now on the same plane as a residence for all Fourth Amendment analysis. That is, a person now enjoys the same expectation of privacy in both her car and home. As a result, the State needs the same showing of probable cause to conduct a search of either repository.

542. 347 Md. 484, 701 A.2d 691 (1997), *cert. denied*, *Tariq Y v. Maryland*, 118 S. Ct. 1105 (1998).

543. *See id.* at 487, 701 A.2d at 692.

544. *See id.* at 495-96, 701 A.2d at 696 (citing 1 WAYNE R. LAFAYE & JEROLD H. ISRAEL, CRIMINAL PROCEDURE § 3.10(d), at 350 (2d ed. 1992)).

of the dining room and the vest over the objection of her child.⁵⁴⁵ Second, the court viewed the search of the room and the search of the vest as a single search, rather than two distinct searches.⁵⁴⁶ Therefore, the mother's valid consent to search the room authorized the officers to search the child's jacket that was left on a table in the room.⁵⁴⁷

The Court of Appeals opinion is rather narrow, specifically applying to the case of clothing left in a common area of a home. Though the opinion may provide some guidance, the validity of such searches conducted in other areas of the home, and of personal effects other than clothing, remains unanswered. The basis of the court's holding, however, may be used to provide some insight into how Maryland courts might decide other parental consent cases. For example, how might a court treat a search of a child's clothing left in the child's room? Though the answer to such questions is certainly not clear, the validity of a search of a child's personal effects depends on both the area in which the effects are located and the type of effects searched. A change in both or either of these factors may alter the validity of a search.

1. *The Case.*—On May 16, 1995, two Frederick County police officers responded to a "911 hang-up call."⁵⁴⁸ Petitioner, a sixteen-year-old minor, met the officers at the front door of his mother's house.⁵⁴⁹ At the same time, the police observed a female walking away from the house.⁵⁵⁰ Both Petitioner and the female denied any knowledge of the 911 call.⁵⁵¹ While questioning Petitioner, the officers noticed an odor of alcohol on his breath and marijuana in the air.⁵⁵² Items were upset throughout the house and on the floor lay the butt of a cigar⁵⁵³ and an empty bottle of liquor.⁵⁵⁴

The officers brought their observations to the attention of Petitioner's mother when she arrived shortly thereafter.⁵⁵⁵ Consequently,

545. See text accompanying notes 681, 684-686.

546. See *infra* note 682 and accompanying text.

547. *Tariq*, 347 Md. at 496, 701 A.2d at 696; see also *infra* note 688.

548. Brief of Petitioner at 2, *In re Tariq A-R-Y*, 347 Md. 484, 701 A.2d 691 (1997) (No. 100) (internal quotation marks omitted).

549. *Id.*

550. *Id.*

551. *Tariq*, 347 Md. at 487, 701 A.2d at 692.

552. *Id.* at 487-88, 701 A.2d at 692.

553. At trial, one of the officers testified that "the use of cigar wrappers is a common method of smoking marijuana." *Id.* at 488 n.1, 701 A.2d at 692 n.1.

554. *Id.* at 487-88, 701 A.2d at 692.

555. *Id.* at 488, 701 A.2d at 692.

she “consented to a search of the house ‘and anything in it.’”⁵⁵⁶ Pursuant to the mother’s consent,⁵⁵⁷ the officers made their way to the dining room and picked up a vest from the dining room table.⁵⁵⁸ Petitioner, who was sitting down next to the officers, stood and stated, “That’s my vest.”⁵⁵⁹ One of the officers told Petitioner to sit down and the officer proceeded to search the vest pockets.⁵⁶⁰ In one of the pockets, the officer found a bag of marijuana.⁵⁶¹ As the officers attempted to arrest Petitioner, he struggled, punching and kicking both of them.⁵⁶² Ultimately, Petitioner was charged with possession of marijuana, resisting arrest, and possession of paraphernalia.⁵⁶³

At his delinquency hearing, Petitioner moved to suppress the marijuana, arguing that the search of his vest violated his Fourth Amendment right to be free from unreasonable searches and seizures.⁵⁶⁴ The trial court denied the motion to suppress, noting that “it would not seem to [the court] that there would be any reasonable expectation of privacy in this vest that was laying in open view on the dining room table.”⁵⁶⁵ Furthermore, “the owner of the premises gave consent to search the premises and its contents.”⁵⁶⁶ Accordingly, Petitioner was found “involved” in the possession of marijuana and resisting arrest, but “not involved” in the possession of paraphernalia.⁵⁶⁷

Thereafter, Petitioner appealed to the Court of Special Appeals, arguing that the search of his vest was an illegal search under the Fourth Amendment and, therefore, the trial court erred in denying

556. *Id.*

557. The Court of Appeals deferred to the trial court’s holding and determined that the trial court “did not err in finding as a fact that the consent given by Tariq’s mother encompassed the entire house *and* its contents.” *Id.* at 489, 701 A.2d at 693 (citing *Florida v. Jimeno*, 500 U.S. 248, 251-52 (1991) (upholding the search of a paper bag located in defendant’s car when defendant gave the officer permission to search for drugs in the car); *United States v. Ross*, 456 U.S. 798, 820-21 (1982) (noting “[a] lawful search of fixed premises generally extends to the entire area in which the object of the search may be found and is not limited by the possibility that separate acts of entry or opening may be required to complete the search”)). This does not mean that the consent necessarily validated the search but merely that the scope of the consent included all the contents in the house. The validity of the consent is a separate issue and is the focus of this note.

558. *Id.* at 488, 701 A.2d at 692.

559. Brief of Petitioner at 3, *Tariq* (No. 100); *Tariq*, 347 Md. at 488, 701 A.2d at 692.

560. *Tariq*, 347 Md. at 488, 701 A.2d at 692.

561. *Id.*

562. *Id.*

563. *See id.*

564. *Id.* at 488, 489-91, 701 A.2d at 692, 693-94.

565. *Id.* at 489, 701 A.2d at 693 (internal quotation marks omitted).

566. *Id.* (internal quotation marks omitted).

567. *Id.* at 488, 701 A.2d at 692.

the motion to suppress. The Court of Special Appeals affirmed the lower court's ruling.⁵⁶⁸ The Court of Appeals then granted certiorari to determine "whether the parent of an unemancipated minor child can consent to a search of the child's personal belongings left in the common area of the home, over the child's objection."⁵⁶⁹

2. *Legal Background.*—The Fourth Amendment of the United States Constitution protects persons from "unreasonable searches and seizures."⁵⁷⁰ In determining what constitutes a reasonable search under the Fourth Amendment, the United States Supreme Court concluded that searches conducted without a warrant are *per se* unreasonable, unless they fall within one of a number of recognized exceptions.⁵⁷¹ One of those recognized exceptions to the warrant requirement is a search conducted pursuant to consent.⁵⁷² Although consent is often obtained from the party against whom the search is targeted, this is not a requirement for a valid search. Courts acknowledge that it is not necessary that consent is obtained from the party against whom the search is directed, but merely that consent is obtained from a party who has authority to consent to the search.⁵⁷³

568. *Id.*

569. *Id.* at 487, 701 A.2d at 692.

570. U.S. CONST. amend. IV. The Fourth Amendment to the United States Constitution reads, in pertinent part, that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated." *Id.*

571. *Katz v. United States*, 389 U.S. 347, 357 (1967) (excluding evidence obtained from FBI surveillance of a phone booth when agents failed to obtain a warrant); *see also Ricks v. State*, 322 Md. 183, 188, 195, 586 A.2d 740, 743, 746 (Md. 1991) (upholding a search of the defendant's luggage as a search incident to arrest). Many scholars argue, however, that there are so many exceptions to the warrant requirement that it is misleading to say that a search without a warrant is *per se* unreasonable. *See California v. Acevedo*, 500 U.S. 565, 582 (1991) (Scalia, J., concurring) (positing that the warrant requirement has "become so riddled with exceptions that it [is] basically unrecognizable"); STEPHEN A. SALTZBURG & DANIEL J. CAPRA, *AMERICAN CRIMINAL PROCEDURE* 68 (5th ed. 1996) (noting that "the so called *per se* rule can be restated as follows: A search and seizure in some circumstances is presumed to be unconstitutional if no prior warrant is obtained, but in other circumstances the prior warrant is unnecessary to justify a search and seizure"); Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 801 (1994) (arguing that the reasonableness clause, not the warrant clause, is "[t]he core of the Fourth Amendment").

572. *See Schneckloth v. Bustamonte*, 412 U.S. 218, 219 (1973) ("It is . . . well settled that one of the specifically established exceptions to the requirements of both a warrant and probable cause is a search that is conducted pursuant to consent." (citing *Davis v. United States*, 328 U.S. 582, 593-94 (1946); *Zap v. United States*, 328 U.S. 624, 630 (1946))).

573. *See United States v. Matlock*, 415 U.S. 164, 169-72 (1974) (holding that search was constitutional where the wife consented to a search of a shared closet that uncovered money from a bank robbery in which her husband was a suspect); *Frazier v. Cupp*, 394 U.S. 731, 740 (1969) (holding search valid in which a homeowner consented to a search of his friend's duffel bag where homeowner had access to the bag); *McCray v. State*, 236 Md. 9,

The United States Supreme Court recognized this aspect of consent searches in *Frazier v. Cupp*.⁵⁷⁴ The Court was confronted with the validity of a police search of a duffel bag conducted pursuant to the consent of Petitioner's cousin.⁵⁷⁵ The search took place in the home of Petitioner's cousin and, at the time of the search, Petitioner was not present.⁵⁷⁶ Petitioner, however, had given his cousin permission to use one compartment of the bag.⁵⁷⁷ The court found that because the cousin had the authority to access the bag, Petitioner, by leaving the bag with the co-user, "assumed the risk" that his cousin would allow someone else access to the bag.⁵⁷⁸ Where multiple persons share the authority to use a container, one who leaves the container with a co-user assumes the risk that the co-user will consent to a search of the container.⁵⁷⁹ Therefore, the search of a container pursuant to a co-user's consent is valid against absent users of the container.⁵⁸⁰

Of some noteworthy significance, the Court rejected Petitioner's argument that his cousin did not have access to the entire bag.⁵⁸¹ Petitioner argued that because he gave his cousin permission to use only

14, 202 A.2d 320, 322-23 (1964) (holding that a search was not unlawful when a father consented to a search of the sun parlor in his house where his son sometimes slept); *Jones v. State*, 13 Md. App. 309, 313-15, 283 A.2d 184, 187-88 (1971) (holding that a search of a child's room conducted pursuant to the mother's consent was not unreasonable).

574. 394 U.S. 731 (1969). The ability of a third party to consent to a search of an area, thereby binding the defendant, stems from the Fourth Amendment's requirement that searches be reasonable. When officers obtain valid consent to search an item or area, from one who has the authority to grant such consent, the search is inherently reasonable. Therefore, even if the consenting party is not the target of the search, the government action is still reasonable and the defendant may not claim a Fourth Amendment violation. See *Matlock*, 415 U.S. at 170 (noting that "the consent of one who possesses common authority over premises or effects is valid as against the absent, nonconsenting person with whom that authority is shared").

575. *Frazier*, 394 U.S. at 740. Petitioner and his cousin were indicted jointly for second-degree murder. Petitioner was convicted by an Oregon state court, whereas his cousin pled guilty to the offense. *Id.* at 732-33.

576. See *id.* at 732-33.

577. *Id.*

578. *Id.* Clothing obtained during the search of the bag was introduced by the State at Petitioner's trial. *Id.*

579. See *id.*; see also *Clarke v. Neil*, 427 F.2d 1322, 1324-25 (6th Cir. 1970) (citing *Frazier* as support for its conclusion that a store owner could consent to a search of an item left in its care by a defendant—in this case, a suit left at a dry cleaners).

580. See *Frazier*, 394 U.S. at 732-33; *United States v. Infante-Ruiz*, 13 F.3d 498 (1st Cir. 1994) (concluding that a friend of the defendant "had sufficient authority over [defendant's] briefcase to consent to its search" where the friend had access to the contents of the briefcase and the briefcase contained property belonging to both the defendant and his friend); *United States v. Davis*, 967 F.2d 84 (2d Cir. 1992) (upholding a search of a footlocker containing effects of the defendant where the owner of the footlocker consented to the search).

581. *Frazier*, 394 U.S. at 732-33.

one compartment of the bag, his cousin's authority to consent to a search was only valid for that one compartment.⁵⁸² However, the Court rejected Petitioner's argument and noted that it would not "engage in such metaphysical subtleties in judging the efficacy of [the co-user's] consent."⁵⁸³

The Supreme Court was again confronted with the validity of a search conducted pursuant to the consent of a third party in *United States v. Matlock*.⁵⁸⁴ The Court held that a wife's consent to a search of a closet, to which both the wife and her husband had access, would be valid against her *absent* husband if the wife had common authority over the area searched.⁵⁸⁵ The Court noted that:

when the prosecution seeks to justify a warrantless search by proof of voluntary consent, it is not limited to proof that consent was given by the defendant, but may show that permission to search was obtained from a third party who possessed common authority over or other sufficient relationship to the premises or effects sought to be inspected.⁵⁸⁶

The Court cautioned, however, that:

[c]ommon authority is, of course, not to be implied from the mere property interest a third party has in the property. The authority which justifies the third-party consent does not rest upon the law of property, . . . but rests rather on mutual use of the property by persons generally having joint access or control for most purposes, so that it is reasonable to recognize that any of the co-inhabitants has the right to permit the inspection in his own right and that the others have assumed the risk that one of their number might permit the common area to be searched.⁵⁸⁷

582. *Id.*

583. *Id.*; see also 1 LAFAYETTE & ISRAEL, *supra* note 544, § 3.10(d)(5), at 240-41 (noting that *Matlock* is ambiguous as to whether a third party's ability to consent to a search of a room and everything in it is "affected by the fact that the defendant maintained exclusive control as to certain areas or effects").

584. 415 U.S. 164 (1974).

585. *Id.* at 169-71, 177.

586. *Id.* at 171.

587. *Id.* n.7 (citations omitted). In support of the contention that the authority to consent to a search is not derived from the law of property, the Court noted two earlier cases. In *Chapman v. United States*, 365 U.S. 610 (1961), the Supreme Court invalidated a search of a tenant's home where police obtained consent from his landlord. Similarly, a hotel clerk was deemed unable to consent to a search of defendant's hotel room in *Stoner v. California*, 376 U.S. 483 (1964).

The *Matlock* Court recognized that a search, conducted pursuant to consent by a third party who has common authority over the area or the personal effects searched, is valid against an absent defendant.⁵⁸⁸

Maryland courts have also addressed the issue of third-party consent and specifically searches of a child's belongings conducted pursuant to parental consent.⁵⁸⁹ In 1964, prior to the Supreme Court cases of *Frazier* and *Matlock*, the Maryland Court of Appeals, in *McCray v. State*,⁵⁹⁰ held valid a father's consent to a police search of a room in his home where his son sometimes slept.⁵⁹¹ The son, who had been arrested and detained by police prior to the search in connection with a burglary, was not present.⁵⁹² The court explained that the father, "[a]s an owner and co-occupant of the house," had the authority to consent to a search of the room and "to bind his son in so doing."⁵⁹³ The ruling, which relied on the father's authority over the premises,⁵⁹⁴ is consistent with the later Supreme Court cases.⁵⁹⁵ The Court

588. See *Matlock*, 415 U.S. at 169-71. The Supreme Court expanded the doctrine of third-party consent when, in *Illinois v. Rodriguez*, 497 U.S. 177 (1990), the Court adopted the doctrine of apparent authority. The *Rodriguez* Court held that, when it is reasonable for police to believe that the party consenting to the search has the authority to consent, the search is valid regardless of the consenter's actual authority to consent to the search. See *id.* at 186. After complaining to police that she had been beaten by Rodriguez, Ms. Fisher accompanied officers to Rodriguez's apartment. During her conversation with the officers, Fisher referred to the apartment as "our" apartment and said that she had clothes and furniture there. She also told the officers that Rodriguez was sleeping in the apartment but she would let them in with her key. Upon entering the apartment, the officers observed, in plain view, drug paraphernalia and containers of cocaine. *Id.* at 180. The officers arrested Rodriguez and seized the cocaine and drug paraphernalia. *Id.* Because Fisher had vacated the premises several weeks earlier, paid no rent, and did not have her name on the lease, the trial court held that Fisher lacked the authority to consent to the police entry of the apartment. *Id.* The Supreme Court, however, remanded the case to the appellate court of Illinois to "determine whether the officers reasonably believed that Fisher had the authority to consent." *Id.* at 189. But see *State v. Diaz*, 925 P.2d 4, 8 (N.M. Ct. App. 1996) (rejecting the apparent authority doctrine on state constitutional grounds and holding that a third party must have actual authority to consent to a search).

589. See *McCray v. State*, 236 Md. 9, 14, 202 A.2d 320, 322-23 (1964) (validating a police search of a room in the parents' home where the defendant minor child sometimes slept); *Waddell v. State*, 65 Md. App. 606, 616-17, 501 A.2d 865, 870-71 (1985) (upholding a police search conducted pursuant to a parent's consent where the child defendant paid rent but the mother had access to the child's room); *Tate v. State*, 32 Md. App. 613, 618-21, 363 A.2d 622, 626-27 (1976) (finding the mother's consent to search the minor defendant's room valid over the objection of the defendant); *Jones v. State*, 13 Md. App. 309, 315, 283 A.2d 184, 188 (1971) (upholding a police search of a child's room conducted pursuant to the consent of the child's mother).

590. 236 Md. 9, 202 A.2d 320 (1964).

591. *Id.* at 14, 202 A.2d at 322-23.

592. See *id.* at 12, 202 A.2d at 321.

593. *Id.* at 14, 202 A.2d at 322 (citing *Bellam v. State*, 233 Md. 368, 196 A.2d 891 (1964)).

594. See *id.*

of Appeals recognized that a party who has authority to consent to a search of an area, even though the party is not a target of the search, may validly consent to a search.

Seven years later, in *Jones v. State*,⁵⁹⁶ the Court of Special Appeals of Maryland validated a search of a child's room based on parental consent.⁵⁹⁷ The child against whom the search was aimed was a minor, paid no rent, and was present at the time of the search but did not object to the search.⁵⁹⁸ Though the mother sometimes entered the room to wake up the defendant, she did not regularly enter the room for purposes of cleaning the room.⁵⁹⁹ In determining the capacity of a parent to consent to a search of his or her child's room, the court noted that a parent has a "superior right to exclude others, including the [child], from her home, and also from the very bedroom that the [child] used."⁶⁰⁰ Consequently, the court held that a parent may consent to a search of a child's room even though the child is present.⁶⁰¹ Notwithstanding its approval of the search, the Court of Special Appeals noted that because the child did not object to the search, the question remained whether a parent could consent to the search of a child's room in the face of a child's objection.⁶⁰²

The effect of a child's objection to a search was addressed by the Court of Special Appeals in *Tate v. State*.⁶⁰³ The court concluded that a parent's consent to a search of a child's room makes the search valid over the objection of the child.⁶⁰⁴ The defendant, a seventeen-year-old minor, did not pay rent for the use of the room in his mother's house and had begun using the room only a few weeks prior to the search.⁶⁰⁵ Although the mother testified that the child had sole use of the room, the court reasoned that the mother not only had common authority over the area searched but had superior authority because she "had the sole control, power and superior right to exclude others,

595. See *United States v. Matlock*, 415 U.S. 164, 171 n.7 (1974) (noting that the ability of a third party to validly consent to a search of an area rests on "mutual use" of or "joint access" to the property).

596. 13 Md. App. 309, 283 A.2d 184 (1971).

597. *Id.* at 315, 283 A.2d at 188.

598. *Id.* at 310-11, 283 A.2d at 185.

599. *Id.* at 310, 283 A.2d at 185.

600. *Id.* at 315, 283 A.2d at 187-88.

601. See *id.*, 283 A.2d at 188; see also George L. Blum, Annotation, *Admissibility of Evidence*, 55 A.L.R. 5th 125, § 4 (1998) (listing cases in which state courts upheld searches conducted pursuant to the consent of a parent even though the child was present at the time of the search).

602. See *Jones*, 13 Md. App. at 315, 283 A.2d at 188.

603. 32 Md. App. 613, 363 A.2d 622 (1976).

604. *Id.* at 619-21, 363 A.2d at 626-27.

605. *Id.* at 619, 363 A.2d at 626.

including the appellant,” from the room.⁶⁰⁶ Furthermore, in an apparent attempt to place some limit on the effects of the holding, the court noted that the facts in *Tate* did not involve the search of personal effects but only the room of the child.⁶⁰⁷ Though the Court of Special Appeals recognized that a parent’s superior authority over the premises enables the parent to consent to searches of areas of the house over the objection of the child, its own limitation to the specific facts of the case implied that similar reasoning does not necessarily expand to encompass searches of personal effects within the area.

The Court of Special Appeals confronted another parental consent case in *Waddell v. State*.⁶⁰⁸ The defendant lived in a room of his parents’ house for which he paid twenty dollars a week in rent.⁶⁰⁹ His mother had access to the room “at all times” because she used the closet in the room.⁶¹⁰ Furthermore, the defendant was not present at the time of the search.⁶¹¹ The Court concluded that under *Matlock*, the search was valid because the mother had access to the room and therefore common authority over the area searched.⁶¹² By allowing his mother unrestricted access to his bedroom, the court held that the defendant assumed the risk that his mother would consent to a search of this room.⁶¹³

Although Maryland courts have long recognized that parties who share common authority over an area can consent to a search of that

606. *Id.* (internal quotation marks omitted) (quoting *Jones*, 13 Md. App. 309, 283 A.2d 187). Many jurisdictions have followed similar reasoning, namely, that a parent is able to validate a search in the face of an objecting child because the parent has not just common authority over the area or effects to be searched but has superior authority over the area or effects. See 1 LAFAYETTE & ISRAEL, *supra* note 544, § 3.10(e), at 242. Thus, the reasoning is still consistent with *Matlock*, where the court merely held that consent by a third party with common authority was valid against an absent defendant. *United States v. Matlock*, 415 U.S. 164, 169-71 (1974). Although, *Matlock* does not answer the question whether a third party can consent to a search aimed at a co-user of the property when that co-user is present and objecting, the superior authority of the consenting party over the area or effects to be searched can overcome any objection of the co-user. See *Tate*, 32 Md. App. at 619, 363 A.2d at 626 (mother consenting to a search of her son’s bedroom); see also Blum, *supra* note 601, at 195-98 (noting cases where “a parent may consent to the warrantless search of his or her home for evidence against his child even though the child has refused to consent to such a search”). But see *id.* at 199-200 (summarizing cases in which “courts held that a parent may not consent to a warrantless search of a home or, at least, of areas under joint control with a child, where the child has refused to consent to such a search”).

607. *Tate*, 32 Md. App. at 620, 363 A.2d at 627.

608. 65 Md. App. 606, 501 A.2d 865 (1985). The opinion was written by Judge Karwacki, the author of the *Tariq* majority opinion.

609. *Id.* at 615-16, 501 A.2d at 870.

610. *Id.* at 616, 501 A.2d at 870.

611. *Id.* at 615-16, 501 A.2d at 870.

612. *Id.* at 617, 501 A.2d at 871.

613. *Id.*

area, they have also recognized that such common authority over an area does not necessarily validate searches of items in that area.⁶¹⁴ The Court of Appeals examined this limit on the effective scope of third-party consent in *Owens v. State*.⁶¹⁵ The defendant left a closed luggage bag in the apartment of a friend where he previously stayed as an overnight guest.⁶¹⁶ The defendant, who planned to return for his bag, did not give his friend permission to open the bag.⁶¹⁷ The court found the friend in whose home the bag was located incapable of validly consenting to a search of the bag.⁶¹⁸ It reasoned that the defendant's friend "did not possess common authority over [the defendant's] bag and had no other sufficient relationship to its contents to validate any consent by her to search the bag."⁶¹⁹ Although the friend had authority to consent to a search of her apartment, she did not have the authority to consent to a search of a luggage bag left in her apartment when she had no access to that item.⁶²⁰ Thus, when a party leaves a closed suitcase in the home of another, asks him or her to hold the suitcase for him, and gives no permission to open the suitcase, that party does not assume the risk that the homeowner will consent to a search of the suitcase.⁶²¹

Other courts have made this same distinction between authority over the room and authority over personal effects within the room.⁶²²

614. See *Owens v. State* 322 Md. 616, 633, 589 A.2d 59, 67 (1991) (holding that the owner of the premises could not validly consent to a search of the defendant's bag left in his home when the homeowner had no right to access the bag). Justice O'Connor, in a concurring opinion in *United States v. Karo*, 468 U.S. 705, 721 (1984) (O'Connor, J., concurring) noted that "[a] privacy interest in a home itself need not be coextensive with a privacy interest in the contents or movements of everything situated inside the home." *Id.* at 725. She went on to explain that, therefore, in the context of a third party's consent to a search, "[a] homeowner's consent to a search of the home may not be effective consent to a search of a closed object inside the home." *Id.*

615. 322 Md. 616, 589 A.2d 59 (1991).

616. *Id.* at 619, 589 A.2d at 60. The bag found its way to the apartment when the defendant's friend, as a favor to the defendant, retrieved the bag from a third party. *Id.* After staying at the apartment for a night, the defendant left the bag at the apartment. *Id.*

617. *Id.*

618. *Id.* at 633, 589 A.2d at 67.

619. *Id.*

620. See *id.* at 630-33, 589 A.2d at 66-67.

621. See *id.* at 630. The court likened the circumstances in this case to a gratuitous bailment: "There is an expectation of privacy because the bailor has sought to maintain the security and privacy of his effects in a place he regarded as a safe place for storage." *Id.*

622. See, e.g., *United States v. Salinas-Cano*, 959 F.2d 861, 865 (10th Cir. 1992) (noting that "ownership and control of property does not automatically confer authority over containers within it" (citing *United States v. Karo*, 468 U.S. 705, 725-26 (1984) (O'Connor, J., concurring))). But cf. 1 L'FAVE & ISRAEL, *supra* note 544, § 3.10(d)(5), at 240 ("[W]hile it has sometimes been suggested that under *Mallock* police are obligated to ascertain the possibly unique pattern of living arrangements between defendant and the third party so

Even more noteworthy is that many jurisdictions have made this distinction in the context of parental searches.⁶²³ For example, the United States Court of Appeals for the Fourth Circuit, in *United States v. Block*,⁶²⁴ concluded that, although a mother had the authority to consent to a search of her twenty-three-year-old son's room in her house, that authority did not extend to a locked footlocker located in that room to which the mother had no access.⁶²⁵ The court reasoned that "[w]hile authority to consent to [a] search of a general area must obviously extend to most objects in plain view within the area, it cannot be thought automatically to extend to the interiors of every discrete enclosed space capable of search within the area."⁶²⁶ Furthermore, the court noted that, under *Matlock*, there can only be an assumption of risk when one shares common authority over the area or effects to be searched.⁶²⁷

Thus, there is no assumption of risk if one leaves a container in the home of another where the homeowner is prohibited from entering the container.⁶²⁸ But when a container is left with a third person who shares common access to the container, the absent party "retains no reasonable expectation of privacy in the place or object,"⁶²⁹ and

as to determine the extent of the 'common authority,' courts generally are not inclined to be that demanding.").

623. See *United States v. Rodriguez*, 888 F.2d 519, 524 (7th Cir. 1989) ("Why a lack of privacy in the room implies a lack of privacy interest in the contents of the containers remains a mystery."); *United States v. Block*, 590 F.2d 535, 540-41 (4th Cir. 1978) (invalidating a search, based on the consent of defendant's mother to search the defendant's bedroom, of a footlocker located in the room); *United States v. Robinson*, 999 F. Supp. 155, 163 (D. Mass. 1998) (concluding that a mother's authority to consent to a search of her son's room did not extend to the pockets of a pair of pants on the floor of the room); *United States v. Whitfield*, 747 F. Supp. 807, 811-12 (D.D.C. 1990) (finding the mother lacked actual authority to consent to a search of her son's jackets hanging in his closet), *rev'd on other grounds*, 939 F.2d 1071 (D.C. Cir. 1991); *In re Scott K.*, 595 P.2d 105, 110-11 (Cal. 1979) (stressing that "[c]ommon authority over personal property may not be implied from the father's proprietary interest in the premises" nor "may it be premised on the nature of the parent-child relation"); *State v. Swenningson*, 297 N.W.2d 405, 407-08 (N.D. 1980) ("The authority of a third party to consent extends only to those areas and objects over which that person has common authority. Such authority does not extend to those areas or effects which are exclusively those of the subject of the search." (citing *Block*, 590 F.2d 535; *Scott*, 595 P.2d 105)).

624. 590 F.2d 535 (4th Cir. 1978).

625. *Id.* at 541.

626. *Id.*

627. *Id.* at 539-40.

628. See *Owens v. State*, 322 Md. 616, 633, 589 A.2d 59, 67 (1991) (holding that the owner of an apartment did not have the authority to consent to a search of defendant's bag left behind in the apartment).

629. *Block*, 590 F.2d at 539 n.5.

therefore assumes the risk that the co-user will consent to a search of the container.⁶³⁰

Although courts have recognized that the party giving consent to a search of personal effects must have common authority in regard to those personal effects, regardless of any common authority over the general area,⁶³¹ not all personal effects are regularly afforded such protection. In particular, some courts have refused to apply this distinction to searches of clothes pockets. In *United States v. Buckles*,⁶³² the Court of Appeals for the Eighth Circuit held that an owner can consent to a search of his home, including the search of an absent party's jacket.⁶³³ The defendant in *Buckles* and two companions were overnight guests in a home owned by a husband and wife.⁶³⁴ Police went to the house with traffic warrants for the husband.⁶³⁵ Although the husband was out of town, the wife consented to a search of the house.⁶³⁶ The police, after taking the defendant and his two companions into custody, seized defendant's jacket and searched the pockets, finding two money orders that were reported missing.⁶³⁷ The court held that the wife, who possessed the authority to consent to a search of the premises, accordingly had the authority to consent to the police seizure and search of the jacket.⁶³⁸

Similarly, in *State v. Fountain*,⁶³⁹ the Supreme Court of South Dakota held that a party that left a jacket in the home of another failed to "protect its privacy" and "left the jacket behind . . . subject to the risk that [the owner] might permit its inspection."⁶⁴⁰ Defendant was staying as a guest in an apartment when police went to the apartment with outstanding warrants for his arrest.⁶⁴¹ The tenant allowed the

630. See *Frazier v. Cupp*, 394 U.S. 731, 740 (1969) (holding that co-user had authority to consent to a search of a bag when defendant left the bag in the co-user's home).

631. See *supra* notes 615-627 and accompanying text (discussing cases in which courts invalidated searches of closed containers when the parties that granted consent, though able to validly consent to a search of the room in which the containers were located, did not possess a common authority over the containers).

632. 495 F.2d 1377 (8th Cir. 1974).

633. *Id.* at 1381-82.

634. *Id.* at 1381.

635. *Id.*

636. *Id.*

637. *Id.* The defendant came into possession of several blank money orders that were shipped by the American Express Company to an agent in Kansas City, but never received by the agent. *Id.* at 1378. The defendant then forged and negotiated some of the money orders. *Id.* at 1378-79.

638. *Id.* at 1381-82.

639. 534 N.W.2d 859 (S.D. 1995).

640. *Id.* at 864-65.

641. *Id.* at 861-62.

police to enter and place defendant under arrest.⁶⁴² After police escorted defendant off the premises, they asked permission to search the apartment.⁶⁴³ Pursuant to the tenant's consent, officers searched the apartment.⁶⁴⁴ When the tenant's child notified the officers that a jacket belonged to the defendant, officers searched the pockets and found LSD.⁶⁴⁵ The Supreme Court of South Dakota concluded that the tenant had the authority to consent to a search.⁶⁴⁶ It reasoned that the defendant assumed the risk that the tenant might permit inspection of the jacket when "he chose not to exercise and maintain control over the jacket when he left it behind."⁶⁴⁷

Other courts, however, have recognized a distinction between the search of a room and the search of pockets of clothing. The United States District Court for the District of Massachusetts, in *United States v. Robinson*,⁶⁴⁸ examined the validity of a search of various containers in a child's bedroom conducted pursuant to parental consent.⁶⁴⁹ Among the items searched were a plastic videocassette container and the pockets of a pair of pants.⁶⁵⁰ The Court concluded that, although the mother could consent to a search of the room, she could not validly consent to a search of the pants pockets.⁶⁵¹ The child maintained an expectation of privacy in the pants pockets that protected the contents from a search conducted pursuant to his mother's consent.⁶⁵² The Court noted that, unlike the pants, a plastic videocassette box does not afford the user a high expectation of privacy.⁶⁵³ Accordingly, the Court found the search of the videocassette box valid.⁶⁵⁴

Similarly, the United States District Court for the District of Columbia, in *United States v. Whitfield*,⁶⁵⁵ noted that a mother's consent to

642. *Id.*

643. *Id.* at 862.

644. *Id.*

645. *Id.*

646. *Id.* at 864-65.

647. *Id.* at 865.

648. 999 F. Supp. 155 (D. Mass. 1998).

649. *See id.* at 160-63.

650. *Id.*

651. *Id.* at 160, 162-63.

652. *See id.* at 163 (noting that pockets "historically have a high expectation of privacy").

653. *Id.* at 162.

654. *Id.* In the alternative, the Court based the validation of the search of the videocassette box on the doctrine of apparent authority. *Id.* It noted that, considering the surrounding circumstances and the absence of any evidence that the mother "made her lack of authority to consent to a search of the movie box known to the searching officers[,] . . . the officers had a reasonable basis for relying on [the mother's] consent to search the movie box." *Id.*

655. 747 F. Supp. 807 (D.D.C. 1990), *rev'd*, 939 F.2d 1071 (D.C. Cir. 1991).

search her child's room did not extend to pockets of clothing hanging in the closet.⁶⁵⁶ Although the court held the search of the pockets valid under the doctrine of apparent authority,⁶⁵⁷ and accordingly denied the motion to suppress the evidence retrieved from the clothing pockets, it stated that "[t]he government . . . failed to carry its burden of establishing as a matter of fact and law that any access retained by defendant's mother . . . extended to the pockets of defendant's jackets in his closet."⁶⁵⁸ The cases indicate that it is this critical determination of the privacy interest protected by a container that is often determinative of searches of personal effects conducted pursuant to parental consent.

The ability of a homeowner to consent to a search of a common area of his or her house has clearly been recognized in Supreme Court and Maryland case law. Furthermore, Maryland courts have recognized that such authority extends, at least under some circumstances, to a child's room in the house. Where the child objects to the search of his or her room, the Court of Special Appeals of Maryland has held that the parent's superior authority over the premises, nonetheless, enables the parent to validly consent to a search. Such superior authority enables the parent to override the child's objection. Prior to *Tariq*, however, no Maryland court had addressed the particular issue raised by that case: whether a parent can, over the objection of the child, validly consent to a search of the child's clothing left in a common area of the house. Although the Court of Appeals of Maryland held that a luggage bag, left in the home of another, preserves an expectation of privacy in its contents so that a third party may not validly consent to a search of the bag, the question of whether clothing similarly preserves an expectation of privacy remained unanswered. Under some situations, courts outside Maryland have held that the owner of clothing maintains an expectation of privacy in the clothing. At the same time, however, some courts have concluded that clothing does not effectively preserve one's privacy.

3. *The Court's Reasoning.*—The Maryland Court of Appeals, in a 5-2 decision,⁶⁵⁹ held that Petitioner's mother had the authority to val-

656. *Id.* at 811-12.

657. The Court held that the agent conducting the search "reasonably believed that defendant's mother had authority to consent to the entire search of defendant's room and all of its contents." *Id.* at 812.

658. *Id.*

659. The dissenting opinion written by Judge Eldridge, and joined by Chief Judge Bell, argued that, in light of Petitioner's objection, the scope of the mother's consent was ambiguous and, therefore, the search of the vest pockets was unreasonable. *Tariq*, 347 Md. at

idly consent to a police search of Petitioner's vest over the objection of Petitioner.⁶⁶⁰ The court noted three grounds on which searches authorized by a parent have been upheld. First, that "the parent is the head of the household or owner of the property."⁶⁶¹ Second, that "the parent is exercising his or her parental authority and control over the unemancipated minor child."⁶⁶² Third, that "the parent is a co-tenant or common resident of jointly occupied property."⁶⁶³ Although both parties argued the issue of whether a parent, through the exercise of parental authority, can limit a child's protection under the Fourth Amendment,⁶⁶⁴ the court did not decide this issue.⁶⁶⁵ Rather, the court reached its holding by relying on the mother's status as "head of the household" and "common resident of jointly occupied property."⁶⁶⁶ The Court of Appeals adopted the reasoning of the

496-97, 701 A.2d at 697 (Eldridge, J., dissenting). The dissent's reasoning relied on a statement by the Court of Appeals for the D.C. Circuit that "[i]t is the government's burden to establish that a third party had authority to consent to a search . . . [and that] burden cannot be met if the agents, faced with an ambiguous situation, nevertheless proceed without making further inquiry." *Id.* at 500-01, 701 A.2d at 699 (second alteration in original) (omission in original) (quoting *United States v. Whitfield*, 939 F.2d 1071, 1075 (D.C. Cir. 1991)).

660. *Tariq*, 347 Md. at 496, 701 A.2d at 696-97.

661. *Id.* at 493, 701 A.2d at 695.

662. *Id.*

663. *Id.*

664. See Brief of Petitioner at 16-20, *Tariq* (No. 100) (arguing that parents cannot waive a minor's rights under the Fourth Amendment). Brief of Respondent at 13-19, *In re Tariq A-R-Y*, 347 Md. 484, 701 A.2d 691 (1997) (No. 100) (noting that "any privacy interest that Tariq had in his vest or in the controlled dangerous substance was subordinate to the right of his parent to ascertain whether he possessed marijuana"). The California Supreme Court addressed the issue of a parent's ability to waive their child's Fourth Amendment rights in *In re Scott K.*, 595 P.2d 105 (Cal. 1979). Although the consenting father lacked access to his minor son's toolbox, the state argued that a parent's interest in the child's "health and welfare" gives rise to a parent's ability to consent to a police search. *Id.* at 107. The Court, however, invalidated the search, concluding that a minor is afforded the full protection of Article 1, Section 13 of the California constitution. *Id.* at 109.

665. See *Tariq*, 347 Md. at 493, 701 A.2d at 695.

666. *Id.* Because the court did not address the issue of a parent's exercise of parental authority over a minor child in the context of consent searches, the court did not determine whether a parent can limit a child's protection under the Fourth Amendment. The opinion, however, is misleading in that it refers to the act of consent by a third party as a "waiver" of the Fourth Amendment rights of an individual. *Id.* at 493, 701 A.2d at 695. Such language might seem to imply that a third party, in this particular case a parent, can limit the protection that the Fourth Amendment provides to another. The United States Supreme Court has likewise referred to third party consent as a waiver of Fourth Amendment rights. See *United States v. Matlock*, 415 U.S. 171 (1974) (discussing whether "a wife's permission to search the residence in which she lived with her husband could 'waive his constitutional rights'"). A more accurate description of third party consent is not a waiver of a right but rather an action that makes the search inherently reasonable. The issue is not "whether the right to be free of searches has been *waived*, but whether the right to be

Court of Special Appeals in *Jones*⁶⁶⁷ and *Waddell*⁶⁶⁸ for the proposition that a parent possesses superior authority over the premises.⁶⁶⁹ Thus, "[t]he consent of a parent to search his or her residence will act to bind a child . . . because ordinarily that parent has shared, if not superior, access to or authority over the area and/or items to be searched."⁶⁷⁰ The court also noted *Tate* for the proposition that, even where the child pays rent, a parent may validly consent to a search of a room under the theory of common authority where the parent had shared access to the room. Recognizing that Petitioner's mother had the authority to consent to the search of a common area of the house, the court concluded that Petitioner's mother, therefore, could validly consent to a search of a vest left in a common area.⁶⁷¹ The court noted that petitioner was living in his mother's home, paid no rent, was a minor, and that the vest was left in a common area of the house.⁶⁷² The court reasoned that, under these circumstances, Petitioner "assumed the risk that his mother, who had authority in her own right to consent to a search of the vest left in a common area of the house, would herself look into his vest pockets, or expose his vest to a search by others."⁶⁷³ The court, therefore, upheld the trial court's denial of the motion to suppress.

4. *Analysis.*—In a somewhat conclusory opinion,⁶⁷⁴ the court upheld the search because the mother could consent, in her own right, to a search of Petitioner's vest left in a common area⁶⁷⁵ and, therefore, the child assumed the risk that the mother would consent to a search of the vest.⁶⁷⁶ The concept of assumption of risk is depen-

free of *unreasonable* searches has been *violated*." *Illinois v. Rodriguez*, 497 U.S. 177, 187 (1990).

667. 13 Md. App. 309, 283 A.2d 184 (1971); *see also supra* note 600 and accompanying text.

668. 65 Md. App. 606, 501 A.2d 865 (1985).

669. *See Tariq*, 347 Md. at 494, 701 A.2d at 696.

670. *Id.*, 701 A.2d at 695-96 (citing *Waddell*, 65 Md. App. 606, 501 A.2d 865; *Tate v. State*, 32 Md. App. 613, 363 A.2d 622 (1976); *Jones*, 13 Md. App. 309, 283 A.2d 184).

671. *Id.* at 496, 701 A.2d at 696-97.

672. *Id.*

673. *Id.*

674. In his brief, Petitioner argued that he maintained a reasonable expectation of privacy in his vest pocket so that his mother could not validly consent to a search of the pocket. Brief of Petitioner at 9-14, *Tariq* (No. 100). Although the court disagreed with such an argument, they did not explain the basis for their disagreement. Rather, they summarily dismissed all of Petitioner's arguments by replying that "[t]he short answer . . . is that petitioner left his vest in the common area within the family home, i.e., the dining room." *Tariq*, 347 Md. at 495-96, 701 A.2d at 696.

675. *See Tariq*, 347 Md. at 492, 701 A.2d at 695.

676. *Id.*

dant on the ability of a third party to consent to the search of the particular area or item. In the case of parental consent searches, a child's assumption of risk inherently depends on the parent's ability to consent to the search in his or her own right.⁶⁷⁷ Where the parent has the authority to consent to a search of the item in his or her own right, the child has assumed the risk that the parent might consent.⁶⁷⁸ Where the parent has no such authority, however, the child has not assumed the risk that the parent might consent to a search.⁶⁷⁹ The concept of assumption of risk relies on a third party's common authority over the particular area or item searched.⁶⁸⁰

Although the court's opinion did not clearly identify the basis of the mother's ability to consent to the search of the vest in her own

677. See *United States v. Block*, 590 F.2d 535, 539-40 (4th Cir. 1978). The *Block* court noted:

it is well settled that [the third party's authority] may be based simply upon the fact that the third person shares with the absent target of the search a common authority over, general access to, or mutual use of the place or object sought to be inspected under circumstances that make it reasonable to believe that the third person has the right to permit the inspection in his own right and that the absent target has assumed the risk that the third person may grant this permission to others.

Id. (citing *United States v. Matlock*, 415 U.S. 164, 171 n.7 (1974) (noting that common authority is based, not on the law of property, but on mutual access or joint control of the property); *United States v. Peterson*, 524 F.2d 167, 180-81 (4th Cir. 1975) (upholding a search of defendant's bedroom, conducted pursuant to the consent of defendant's mother, where the mother "had access to and complete control of the entire premises, including the bedroom"); *United States v. Gradowski*, 502 F.2d 563, 564 (2d Cir. 1974) (per curiam) (upholding a search of defendant's automobile trunk where the people with whom defendant left his car, and to whom defendant gave his keys, consented to the search); see also *supra* notes 587, 613, 639-647 and accompanying text (citing cases that relied, in part, on the assumption of risk doctrine).

678. See *Frazier v. Cupp*, 394 U.S. 731, 740 (1969) (holding that a third party could validly consent to a search of defendant's luggage bag because defendant assumed the risk that a co-user of the bag might consent to a search in her own right).

679. See *Block*, 590 F.2d at 540-41 (finding no assumption of risk when defendant's mother had access to the room but not the footlocker inside the room); *United States v. Robinson*, 999 F. Supp. 155, 162-63 (D. Mass. 1998) (holding that the mother's authority to consent to a search of defendant's room did not extend to the pockets of his pants on the floor of the room); *United States v. Whitfield*, 747 F. Supp. 807, 812 (D.D.C. 1990) (validating the search of defendant's jacket under the doctrine of apparent authority but noting that the mother lacked any actual authority to consent to a search of the jacket even though she could consent to a search of the room), *rev'd*, 939 F.2d 1071 (D.C. Cir. 1991).

680. To say that one assumed the risk that a third party might consent to a search because he or she left personal effects in a particular area is merely a conclusory statement, and yet this is exactly what the Maryland Court of Appeals said in *Tariq*. The opinion stated that the mother had superior authority over the room and that, therefore, the child assumed the risk of a potential search. *Tariq*, 347 Md. at 496, 701 A.2d at 696. But the court never addressed the essential intermediate step; why the mother's authority over the room extended to the vest.

right, the conclusion appeared to rely on two factors. First, the court noted that the mother had common and superior authority over the room.⁶⁸¹ Second, the court did not recognize a significant distinction between a search of the room and a search of the pockets of a vest located in the room.⁶⁸² The *Tariq* court appeared to follow those jurisdictions that hold that one who has the authority to consent to a search of a common area of a house also has the authority to consent to a search of pockets of clothing in the common area, regardless of his or her authority over the clothing alone.⁶⁸³

Considering these factors one at a time, the court's reasoning progressed in the following manner. First, the mother's superior authority over the room enabled her to validly consent to a search of the room.⁶⁸⁴ As the Court of Special Appeals recognized in *Tate v. State*,⁶⁸⁵ and the Court of Appeals agreed, a parent's superior authority may override the objection of the child.⁶⁸⁶ Second, the lack of distinction between a search of the room and a search of the vest pockets expanded the valid search to include the pockets.⁶⁸⁷ In the court's view, because the search of the room and the search of the vest pockets were one and the same, the mother's superior authority encompassed the vest pockets.⁶⁸⁸ Therefore, the mother could validly consent to a search of the vest pockets over Petitioner's objection.⁶⁸⁹ By ignoring any distinction between the room and the vest pockets, the court was able to hold the search valid while respecting the holding in *Owens*,⁶⁹⁰ that a third party must have common authority over

681. *Id.*

682. Rather than treat the search of the dining room and the search of Petitioner's vest as separate searches, the court viewed the police action as one search. *See id.* at 495-96, 701 A.2d at 696.

683. *See United States v. Buckles*, 495 F.2d 1377, 1381-82 (8th Cir. 1974) (finding that a homeowner's authority to consent to a search of her home authorized the homeowner to consent to a search of defendant's jacket); *State v. Fountain*, 534 N.W.2d 859, 864-65 (S.D. 1995) (same).

684. *See Tariq*, 347 Md. at 496, 701 A.2d at 696.

685. 32 Md. App. 613, 363 A.2d 622 (1976); *see also supra* notes 604-607.

686. *See Tariq*, 347 Md. at 496, 701 A.2d at 696-97.

687. *See supra* note 682.

688. *See Tariq*, 347 Md. at 496, 701 A.2d at 696-97.

689. *See id.*

690. 322 Md. 616, 589 A.2d 59 (1991). Though the *Tariq* court did not address the *Owens* opinion, the court effectively distinguished the two cases by concluding that clothing, when left in the common area of a house, does not afford the same protection of one's privacy as does a luggage bag. *Compare Tariq*, 347 Md. at 496, 701 A.2d at 696 (upholding the search of a vest left in a common area of a house where the defendant's mother consented to a search of the house) with *Owens*, 322 Md. at 632, 589 A.2d at 66 (holding defendant had a legitimate expectation of privacy in a luggage bag left in the living room of a friend's apartment). Just as a parent recognizes superior authority over the premises,

the container to validly consent to a search of the container.⁶⁹¹ Because there was no evidence that the mother possessed common authority over the vest pockets,⁶⁹² the court could not view the searches of the dining room and vest as two distinct searches, while maintaining that the search of the vest was valid.⁶⁹³ Certainly it would appear that, if the court were to recognize a separate privacy interest in the container, the parent must establish common authority over the container to consent to a search.⁶⁹⁴ But as the *Tariq* court has recognized, articles of clothing left in a common area do not preserve a distinct area of privacy that is separate from the common area.⁶⁹⁵ The

relative to his or her child, it follows that a homeowner or tenant exerts "superior authority . . . , including the right to exclude him from the premises," *Tariq*, 347 Md. at 494, 701 A.2d at 696 (omission in original) (quoting *Tate v. State*, 32 Md. App. 613, 619-20, 363 A.2d 622, 626 (1976)), relative to houseguests. Thus, after *Tariq*, although a houseguest maintains an expectation of privacy in a luggage bag, see *Owens*, 322 Md. at 630, 589 A.2d at 65-66, that guest would not maintain an expectation of privacy in clothes pockets, see *Tariq*, 347 Md. at 496, 701 A.2d at 696 (failing to find a distinction between the search of a room and the search of jackets in the room).

691. See *Owens*, 322 Md. at 633, 589 A.2d at 67 (holding that a friend of the defendant, at whose apartment the defendant left a luggage bag, did not have the authority to consent to a search of the bag); *supra* notes 624-630 and accompanying text (explaining the distinction between authority to consent to a search of a room and authority to consent to a search of personal effects in the room).

692. There was no evidence as to whether *Tariq's* mother had access to the vest and, therefore, possessed the resulting common authority to consent to a search of the pockets of the vest based on access to the property. See *Tariq*, 347 Md. at 487, 701 A.2d at 692 (describing vest as petitioner's "personal belonging[]"); *id.* at 489, 701 A.2d at 693 (describing vest as petitioner's "personal effect[]"). Furthermore, the objection by Petitioner favors just the opposite conclusion; that Petitioner had sole access to the jacket. See *id.* at 488, 701 A.2d at 692 (noting that petitioner "stood and indicated that the vest belonged to him"). Therefore, it was necessary for the court to find some other basis upon which consent could be validated. Although it is possible that the mother purchased Petitioner's vest, considering his age of sixteen, common authority is not to be determined by mere property interest. See *United States v. Matlock*, 415 U.S. 164, 171 n.7 (1974) (explaining that "[t]he authority which justifies the third-party consent does not rest upon the law of property . . . but rests rather on mutual use of the property by persons generally having joint access or control"). Even when a party owns the item or area to be searched, their complete lack of access to the item or area would equate to a lack of common authority to consent to a search. See *id.* (citing cases in which a nonpossessory interest in the subject property was held insufficient to authorize consent).

693. See *United States v. Block*, 590 F.2d 535 (4th Cir. 1978) (holding invalid the search of a footlocker when the party giving consent had authority to consent to a search of the room but no such authority over the footlocker); *Owens*, 322 Md. at 633, 589 A.2d at 67 (concluding that tenant did not have actual authority to consent to a luggage bag left in her apartment by the defendant).

694. See, e.g., *Owens*, 322 Md. at 630, 589 A.2d at 65 (refusing to uphold the search of a luggage bag because the party that granted consent did not possess common authority over the bag and the defendant maintained "an expectation of privacy in the bag").

695. See *Tariq*, 347 Md. at 696, 701 A.2d at 495-96 (failing to distinguish between the search of a room and the search of a vest located in the room).

holding of the court in this case is relatively narrow. The area of the house and the particular effects searched were significant factors in the court's conclusion that Petitioner assumed the risk that his mother would consent to a search of his vest. The opinion, therefore, is limited to searches of clothing, or similar objects, in a common area of the home. Consequently, *Tariq* leaves unanswered a parent's authority to consent to searches of a child's personal effects under other circumstances. Although the court believed that, generally, a parent will possess the authority to offer a valid consent of his or her child's room and personal effects,⁶⁹⁶ the court noted that "[t]here may also be cases, however, in which a parent's consent to search would not be valid in the face of the child's objection."⁶⁹⁷ *Tariq* and other cases, however, do provide some insight into how Maryland courts might rule under other circumstances.

In order to provide such insight, the following discussion sets out a hypothetical model that can be used to determine the probable validity of parental consent searches conducted under a variety of circumstances. In this hypothetical model, police search a child's personal effects pursuant to a parent's consent but over the objection of the child. The personal effects are located in the parent's home but the parent never looks within the personal effects nor has the permission to look in them.⁶⁹⁸ While the above factors are held constant throughout all variations of the model, the model also consists of two variable factors.

The first variable is the area in which the personal effects are located. This includes not only the particular room but the circumstances surrounding both the parent's and child's access to the room. The second variable is the type of container or personal effect searched. In order to separately understand the impact of each of these variables, initially one variable will be fixed while the other is modified and vice versa. Finally, both variables will be altered concurrently.

By altering the circumstances surrounding the parent's access to the room, the parent's superior authority over the room is affected. As parental access decreases, the concept of superior parental author-

696. *See id.* at 494, 701 A.2d at 695-96 (citing *Tate*, 32 Md. App. at 619-20, 363 A.2d at 626, for the proposition that a parent's superior authority over the premises will generally allow a parent to consent to searches of his or her child's personal effects). *But see Tate*, 32 Md. App. at 620, 363 A.2d at 627 (declining to answer the question of whether the search would have been valid if it involved the child's personal effects).

697. *Tariq*, 347 Md. at 495, 701 A.2d at 696.

698. These facts are modeled after the fact pattern in *Tariq*.

ity diminishes. Likewise, the parent's degree of access may play a role in determining whether the particular personal effect searched provides the child with distinct privacy rights separate from the privacy provided by the room. Similarly, an alteration of the personal effect or container searched influences whether a court will find a distinction between a search of the room and a search of personal effects within the room.⁶⁹⁹

a. *Variation of the Room.*—In the first set of examples, the type of container is held static while the area of the house is modified. For comparison purposes, the container is the same as that in *Tariq*, a vest pocket.⁷⁰⁰ With the type of container static, there is a continuum of possible scenarios. At one extreme the parent has no right of access to the room. This could be represented by a situation in which a child pays rent for use of the room, the door is kept locked, the parent is unable to unlock the door, and the parent never enters the room.⁷⁰¹ This situation comes closest to reflecting a landlord-tenant relationship. At this point, the concept of superior parental authority is at its weakest. It seems likely that, under these circumstances, a parent could not even authorize a search of the room let alone a search of a child's personal effects in the room.⁷⁰²

At the opposite extreme, the parent has unqualified access to the room, whereas the child has limited or no access. This could be represented by the parents' bedroom where the child has been told he is

699. Compare *United States v. Block*, 590 F.2d 535, 541 (1978) (viewing the search of a room and a search of a footlocker in the room as two distinct searches), and *Owens*, 322 Md. at 631, 589 A.2d at 66 (concluding that a tenant had the authority to consent to a search of her apartment but lacked the authority to consent to a search of defendant's bag in the apartment), with *Tariq*, 347 Md. at 495-96, 701 A.2d at 696 (viewing the search of a room and the search of a vest in the room as one search).

700. *Tariq*, 347 Md. at 488, 701 A.2d at 692.

701. Though there are apparently no Maryland cases that address similar facts, other courts have found that a child living in his parents' home can effectively negate his parents' authority to consent to a search of his room. See, e.g., *State v. Carsey*, 664 P.2d 1085, 1089, 1094 (Or. 1983) (recognizing that the child's grandparents—whom the Court viewed as parents—lacked the authority to consent to a search of the child's bedroom in their home because the child paid rent and the grandparents essentially “never went into his room”). The question whether Maryland courts will ever find that a child can take steps to negate his parents' authority over his room is unclear.

702. Though the parent may own the home, a property interest alone does not establish the authority to consent to a police search. See *United States v. Matlock*, 415 U.S. 164, 171 n.7 (noting that “[c]ommon authority is . . . not to be implied from the mere property interest a third party has in the property”). Where the parent lacks any right to enter the room and his or her only right over the room lies in his or her property interest in the room, it follows that, under *Matlock*, he or she cannot validly consent to a search of the room. See *id.*

not permitted to enter.⁷⁰³ At this point, the parent's authority is at its most superior. Under the court's reasoning in *Tariq*, the parent has superior authority over the area "including the right to exclude [the child] from the premises."⁷⁰⁴ Because the *Tariq* court makes no distinction between a search of the room and a search of the vest pockets, in the case of a common area the child assumed the risk that the parent might consent to a search of the premises and the vest.⁷⁰⁵

As a starting point, consider the actual scenario in *Tariq*, where the parent and child share common access to the room of the house in which the container is located.⁷⁰⁶ This lies somewhere in the middle of the two extremes. As the court indicated, a search of the vest under these conditions would be valid when the parent consented to the search because the parent has superior authority over the room.⁷⁰⁷ Because the parent's authority to consent to a search of the room encompasses the vest, the child assumed the risk that a parent would allow both the area and vest to be searched.⁷⁰⁸

Moving along the continuum in the direction of lesser parental authority, consider the situation in which the vest is left in the child's room.⁷⁰⁹ Assume, also, that the child pays no rent and the parent has access to the room. The Court of Special Appeals of Maryland held, in *Tate v. State*,⁷¹⁰ that a parent may validly consent to a search of a child's room, over the objection of the child, where the parent has

703. For the sake of argument we will ignore the question of how the child left his vest in an area that he is unable to enter.

704. *Tariq*, 347 Md. at 494, 701 A.2d at 696 (quoting *Tate v. State*, 32 Md. App. 613, 619-20, 363 A.2d 622, 626 (1976)). In fact, there is no common authority over the room shared by the parent and child in this situation because the child is completely lacking authority. The child has no expectation of privacy in the room and, therefore, has no standing to challenge a search of the room. If, however, the court viewed the search of the vest and the search of the room as two separate searches, the child could challenge a search of the vest though he would lack the standing to challenge a search of the room. See *Owens*, 322 Md. at 626-30, 589 A.2d at 64-66 (concluding that the defendant did not have a legitimate expectation of privacy in a third party's apartment but that he maintained a legitimate expectation of privacy in a closed luggage bag that he left in the apartment); see also *United States v. Karo*, 468 U.S. 705, 725 (1984) (O'Connor, J., concurring) (noting that "the movement of a guest's closed container into another's home involves overlapping privacy interests").

705. See *supra* notes 682-683, 688-691 and accompanying text.

706. See *Tariq*, 347 Md. at 495-96, 701 A.2d at 696.

707. See *supra* notes 666-670 and accompanying text.

708. See *supra* note 678 and accompanying text.

709. For cases with similar fact patterns, see *United States v. Robinson*, 999 F. Supp. 155 (D. Mass. 1998) (search of pants pockets in child's room) and *United States v. Whitfield*, 747 F. Supp. 807 (D.D.C. 1990) (search of jacket in child's room), *rev'd*, 939 F.2d 1071 (D.C. Cir. 1991).

710. 32 Md. App. 613, 363 A.2d 622 (1976).

access to the room.⁷¹¹ This holding rests on the concepts of joint access to the room and the superior authority of the parent over the premises.⁷¹² Because a parent under this scenario can validly consent to a search of the room, the determinative issue concerning the search of the child's personal effects is whether the court distinguishes between the search of the room and the search of the personal effects. This, in turn, depends on whether clothing left in a bedroom under such circumstances provides a greater protection of privacy than when such clothing is left in a common area. If a court determines, as did the *Tariq* court, that the search of the room includes the search of the vest, the parent's authority to consent to a search of the room will include a search of the vest pockets.⁷¹³ Although there is no joint access to the vest, the child still assumed the risk that the parent might consent to a search because the parent exercised common, and superior, authority over the room.⁷¹⁴

There is, however, a substantial argument that under these circumstances, a court should view the search of the room and the vest as two distinct searches. The underlying principle of the court's holding in *Tariq* was that the child assumed the risk that the mother might consent to a search of a vest left in a common area of the house. A child, however, arguably does not assume such a risk when he or she leaves the clothing in his or her own room, rather than in a common area of the house.⁷¹⁵ Unlike clothing left in a common area of a house, clothing left in a child's bedroom may maintain an expectation

711. *Id.* at 620, 363 A.2d at 627 (declining to decide whether, under such circumstances, the parent's authority to consent to a search would extend to personal effects located in the child's room); see *supra* notes 604-606 and accompanying text (discussing the *Tate* holding).

712. See *Tate*, 32 Md. App. at 619-20, 363 A.2d at 626 (stating "[w]hat is crucial and dispositive . . . is that [defendant's mother] possessed not only common authority with [defendant] over the searched premises, but in fact possessed superior authority under these circumstances, including the right to exclude [defendant] from the premises").

713. See *Tariq*, 347 Md. at 495-96, 701 A.2d at 696 (upholding a search of the pockets of a child's vest, located in the dining room of the family house, where the child's mother consented to the search).

714. See *id.* (noting that defendant "assumed the risk that his mother, who had authority in her own right to consent to a search of the vest left in a common area of the house, would herself look into his vest pockets, or expose his vest to a search by others").

715. To hold that the child assumed the risk would effectively mean that a child's protection under the Fourth Amendment is subject to the control of his or her parent while the child is living in the parent's home. Additionally, if a child is held to assume the risk of a police search when he or she leaves clothing in his or her own room, there would seem to be no area in which a child can be free from such a risk short of placing the clothing in a separate container. See *Owens v. State*, 322 Md. 616, 589 A.2d 59 (1991) (holding that a person may not validly consent to a search of luggage left in his home by a houseguest if he or she lacks any authority over the luggage); *United States v. Block*, 590 F.2d 535, 542

of privacy that is otherwise lost when such clothing is left in a common area.⁷¹⁶ Because the child maintains a distinct expectation of privacy in the contents of the clothing, he or she has not assumed the risk that his or her parent might consent to a search of the clothing. Therefore, this greater protection would require that the courts view the search of the room and the search of the clothing as two separate searches. Where there is no evidence that the parent has the right or permission to access the contents of the clothing, the parent cannot validly consent to a search of the clothing.

Despite this plausible argument, it is not unlikely that Maryland courts will follow the analysis in *Tariq*, and the example set by the Supreme Court in *Frazier v. Cupp*,⁷¹⁷ and refuse to "engage in such metaphysical subtleties"⁷¹⁸ required to find the search of the jacket to be separate from the search of the room.⁷¹⁹ The Court of Appeals's doctrine of superior authority, combined with the lack of distinction between the room and the vest pockets, leads to the possible conclusion that the child assumed the risk that his mother might consent to a search of his vest left in his or her own room. But it is important to note that the answer to this question was not provided by *Tariq* and remains open. The court specifically noted that there may be some cases "in which a parent's consent to search would not be valid in the face of the child's objection."⁷²⁰

Now consider the outcome as one continues to move along the continuum in the direction of no parental authority over the room. As one moves farther away from the starting point, the concept of superior parental authority over the room grows weaker. Suppose the

(1978) (concluding that defendant's mother lacked the authority to consent to a search of a locked footlocker in defendant's room).

716. Compare *United States v. Robinson*, 999 F. Supp. 155 (D. Mass. 1998) (holding that the mother could not validly consent to a search of pants in her child's room), and *United States v. Whitfield*, 747 F. Supp. 807 (D.D.C. 1990) (concluding that a mother did not have the authority to consent to a search of pockets of clothing in her son's closet), *rev'd*, 939 F.2d 1071 (D.C. Cir. 1991), with *United States v. Buckles*, 495 F.2d 1377 (8th Cir. 1974) (upholding a search of defendant's jacket where the defendant left the jacket in his home and his wife consented to the search), and *State v. Fountain*, 534 N.W.2d 859, 864 (S.D. 1995) (stating that where the defendant left his jacket in another's home, he failed to "protect its privacy").

717. 394 U.S. 731 (1969).

718. *Id.* at 740 (referring to the Court's refusal to decide if a person's authority to use one pouch in a bag authorizes him to consent to a search of the entire bag).

719. See *supra* notes 682-683 and accompanying text (noting that the *Tariq* court refused to view the search of the room and the search of the vest as separate searches).

720. *Tariq*, 347 Md. at 495, 701 A.2d at 696.

child pays rent but the parent has some access to the room.⁷²¹ Clearly, under *Matlock*, the parent can consent to the search of the room if the child is absent and not objecting.⁷²² However, whether a parent, under these circumstances, can consent to a search of the room over the objection of the child, and whether that consent extends to a search of clothing pockets, is less clear. First, the superior authority of the parent over the premises may be somewhat diminished by the payment of rent by the child.⁷²³ Second, there does not appear to be the degree of assumption of risk as existed in *Tariq*.⁷²⁴ Where the occupant of the room is a minor child, however, a court is unlikely to conclude that a parent relinquishes their superior authority even if certain steps are taken to make the room the child's own, including the payment of rent.⁷²⁵ Therefore, it may be that the parent loses their superior authority and, accordingly, their ability to consent to a search of the room over the child's objection only in the most extreme case of a minor child exercising complete control of the room. Although a parent may be capable of validly consenting to a search of his or her minor child's room even if the child pays rent, such authority will not necessarily validate a search of clothing located in the room. The *Tariq* court relied on the fact that the clothing was left in a common area of the house.⁷²⁶ Where the clothing is left in the child's room and the child has minimized the parent's authority

721. For a case with similar facts, see *Waddell v. State*, 65 Md. App. 606, 501 A.2d 865 (1985), where a child paid his parents twenty dollars per week in rent but the mother had authority to consent to a search of the room because she sometimes used the closet in the room and had access to the room at all times. *Id.* at 615-17, 501 A.2d at 870-71.

722. See *United States v. Matlock*, 415 U.S. 164, 171 (1974) (holding that a person with common authority over an area may consent to a search of that area); see also *McCray v. State*, 236 Md. 9, 14, 202 A.2d 320, 322-23 (1964) (holding that a father could consent to a search of a sunroom where his son sometimes slept); *Jones v. State*, 13 Md. App. 309, 315, 283 A.2d 184, 188 (1971) (holding that a parent could consent to the search of a bedroom used by her son who did not object to the search).

723. The general rule is that a parent may validly consent to a search of their child's room over the child's objection because the parent exercises superior authority over the premises. *Tate v. State*, 32 Md. App. 613, 619-20, 363 A.2d 622, 626-27 (1976). The superior authority, however, might be effectively limited, or negated, under certain circumstances. See *State v. Carsey*, 664 P.2d 1085, 1089, 1094 (Or. 1983) (holding that the payment of rent by the child and the fact that his grandparents never entered the room, negated the grandparents' ability to consent to a search of the child's room).

724. In this hypothetical, the child has left the vest in his room. However, in *Tariq* the Petitioner left his vest in a common area of the house. *Tariq*, 347 Md. at 495-96, 701 A.2d at 696.

725. See *Waddell*, 65 Md. App. at 615-17, 501 A.2d at 870 (finding a search valid where the child paid rent but was not present at the time of the search).

726. *Tariq*, 347 Md. at 496, 701 A.2d at 696.

over the room, that child probably has not assumed the risk that a parent might consent to a search of clothing located in the room.

In a more extreme case, where the facts of the situation indicate that the parent lacks any access to the room, the validity of a search of the room and a search of the vest pursuant to parental consent becomes even less clear. To say that a child assumed the risk that a parent would consent to a search of his vest when the vest was left in his room is more tenuous when the child has taken steps to limit parental access to the room.⁷²⁷ As the child takes further steps to protect his or her privacy, the risk of parental consent diminishes. However, as long as there exists some authority by which the parent may consent to a search of the room, there exists a possibility that the parent may also validly consent to a search of the vest located in the room. And as long as a court also determines that a parent has *superior* authority over the room, the parent's consent will override any objection by the child to the search of a container located in that room.⁷²⁸ Where, however, the parental authority over the room is diminished, as in the previous examples, the objection of the child may play an important role in determining the validity of the search.⁷²⁹

b. Variation of the Container.—In the second set of examples, the area of the room, and all surrounding circumstances related to the room, are held constant while the type of personal effect is modified. As discussed above, a change in the characteristics of the container affects the likelihood that the court will conclude that there is no distinction between a search of the room and a search of the container.⁷³⁰ For the purpose of these examples, it is assumed that the child's personal effects are located in the family dining room, accessible by all members of the family.⁷³¹ As was the case when the circumstances surrounding the room were altered, the variation of the

727. In *Tariq*, the vest was left in the dining room. *Tariq*, 347 Md. at 495-96, 701 A.2d at 696. The court noted that the vest was left in a common area of the house and, therefore, Petitioner "assumed the risk" that his mother might consent to a search. *Id.* at 496, 701 A.2d at 696.

728. See *id.* at 496, 701 A.2d at 696 (holding that the child assumed the risk where his mother had authority to consent to a search of the room).

729. As an initial matter, the child's objection to the search of clothing located in the child's room raises a legitimate question as to the parent's authority to consent to such a search. As Judge Eldridge noted in his dissenting opinion, "[i]t is the government's burden to establish that a third party had authority to consent to a search . . . [and that] burden cannot be met if the agents, faced with an ambiguous situation, nevertheless proceed without making further inquiry." *Tariq*, 347 Md. at 500-01, 701 A.2d at 699 (Eldridge, J., dissenting).

730. See *supra* note 699.

731. This is the same as the scenario in *Tariq*. *Tariq*, 347 Md. at 495-96, 701 A.2d at 696.

type of container allows for unlimited factual variations along a continuum. Furthermore, as in all of the hypotheticals, it is presumed that the parent has no right to access the container.

At one extreme, the child's personal effect is a container that has an interior space considered distinct from the room in which it is situated; for example, a locked footlocker.⁷³² Courts regard such containers as furnishing the user a privacy interest separate from any privacy interest in the room.⁷³³ At this extreme, a court will likely distinguish between a search of the room and a search of the container.⁷³⁴ Though the parent may have the authority to consent to a search of the room, that authority does not extend to the contents of the child's locked container when the parent lacks any right to access the container.⁷³⁵ Although the parent will generally exercise superior authority over the room, which validates the search of the room over the objection of the child, the complete lack of access to the container results in the parent's inability to consent to a search of the container.⁷³⁶ Because the search of the locked box is a search separate from a search of the room, the parent must have authority to search the box independent of any authority over the room.⁷³⁷

Furthermore, because the search of the container is separate from a search of the room, and the parent has no authority over the container, the rational conclusion is that the child has not assumed the risk that the parent might consent to a search.⁷³⁸ Assumption of risk arises in the case of shared authority over an area or container; it can be established when the defendant is absent and relinquishes any

732. For an example of a court's treatment of such a container, see *United States v. Block*, 590 F.2d 535, 540 (4th Cir. 1978) (holding that authority to search a room does not automatically extend "to the interior of the footlocker in the room").

733. See *id.* at 541 (noting that "the law's 'enclosed spaces'—mankind's valises, suitcases, footlockers, strong boxes, etc.—are frequently the objects of his highest privacy expectations, and that the expectations may well be at their most intense when such effects are deposited temporarily or kept semi-permanently in public places").

734. See *Owens v. State*, 322 Md. 616, 630-33, 589 A.2d 59, 66-67 (1991) (distinguishing between a search of the room and a search of a luggage bag in the room); see also *Block*, 590 F.2d at 540 (distinguishing the search of a footlocker from the search of a room); *In re Scott K.*, 595 P.2d 105, 107-09 (Cal. 1979) (distinguishing the search of a toolbox from the search of a room).

735. See *Block*, 590 F.2d at 539-42 (holding that mother's authority to consent to a search of her 23-year-old son's room did not extend to a search of the locked footlocker in the room).

736. *Id.*

737. See *Owens*, 322 Md. at 633, 589 A.2d at 67 (holding invalid a search of a luggage bag because the party giving consent lacked any authority over the bag).

738. See *supra* notes 687-691 and accompanying text (noting that, in *Tariq*, the mother was able to consent to a search of her son's jacket only because the court did not distinguish between a search of the room and a search of the jacket).

expectation of privacy,⁷³⁹ or when the defendant shares the area or container with one who has *superior* authority over the area or container.⁷⁴⁰ Where a child leaves a locked container in the dining room, though the parent exercises superior authority over the room, the child has effectively negated any assumption of risk that a parent might consent to a search because the parent is not capable of gaining access to the container.

At the opposite extreme, the container is one which historically is given no protection. The clearest example is a plastic baggie or other clear container. Because a search of the room would naturally disclose the contents of any transparent containers, it would be illogical to conclude that a search would not include the contents of such a container.⁷⁴¹ Where the parent has the authority to consent to a search of the room, and a search of the room includes a transparent container, the parent's authority logically extends to the contents of the container.

In between these two extremes is a search of the pockets of articles of clothing. Although some courts recognize a distinction between a search of the room and a search of the pockets,⁷⁴² the Court of Appeals has afforded clothing no such protection when left in a common area.⁷⁴³ The court has concluded that when clothing is left in a common area, the owner of the clothing has assumed the risk that a third party will consent to a search of the room and clothing.⁷⁴⁴

739. See *United States v. Matlock*, 415 U.S. 164, 169-72 (1974) (holding that a wife could consent to a search of shared living quarters when her husband was absent); *Frazier v. Cupp*, 394 U.S. 731, 740 (1969) (holding that a co-user of bag could consent to search of bag when defendant was absent).

740. See *Tariq*, 347 Md. at 495-96, 701 A.2d at 696 (holding that a mother was capable of consenting to a search of her child's vest, although the child was present and objecting, because the mother possessed superior authority over the property); *Tate v. State*, 32 Md. App. 613, 618-19, 363 A.2d 622, 626 (1976) (upholding a search of a child's room pursuant to mother's consent in spite of the child's presence and objection to the search); *Jones v. State*, 13 Md. App. 309, 315, 283 A.2d 184, 187-88 (1971) (holding that a mother could consent to a search of her son's room because she possessed superior authority over the room).

741. See, e.g., *United States v. Robinson*, 999 F. Supp. 155, 161 (D. Mass. 1998) (treating the search of a plastic bag as included in the scope of the search of the room).

742. See *id.* at 163 (holding that a party that had authority to consent to a search of the room did not have authority to consent to a search of pockets of another's clothing in that room); *United States v. Whitfield*, 747 F. Supp. 807, 811-12 (D.C. 1990) (same), *rev'd*, 939 F.2d 1071 (D.C. Cir. 1991).

743. See *supra* notes 682-689 and accompanying text (discussing the *Tariq* court's treatment of the searches of the room and the vest as one search).

744. See *Tariq*, 347 Md. at 495-96, 701 A.2d at 696.

Therefore, any consent that validates the search of a common area also validates the search of pockets of clothing in the area.⁷⁴⁵

The determinative point on the continuum lies where a court distinguishes between the container and the room in which it is located. However, where this point lies is not clear.⁷⁴⁶ Suppose the container is a zippered backpack.⁷⁴⁷ Maryland courts will probably recognize a search of the backpack as a search separate from a search of the room.⁷⁴⁸ Therefore, the parent's consent is insufficient to validate a search of the backpack.⁷⁴⁹ Such a container is one that, historically, affords the user a certain degree of privacy.⁷⁵⁰ Even though the backpack is in the dining room, a common area of the house, the child exerts an expectation of privacy over the contents of the backpack by closing it and keeping its contents away from the view of co-occupants of the house.⁷⁵¹ Where the container or personal effect is one that affords the child an expectation of privacy, separate from any privacy rights in the room, a search of the container is a search beyond the scope of the room.⁷⁵² Regardless of its location in the

745. *See id.*

746. Even where this distinction can be made, the court, in considering parental consent to search a minor's personal effects, may likely determine that the parent exercises superior authority over the effects distinct from any authority over the room. In such a case, the type of container is irrelevant. The parent can consent to a search of the container, over the objection of the child, based on their superior authority. Furthermore, the privacy that a particular container affords its user may sometimes depend on the location of the container.

747. This item was chosen because it is likely to be a common item searched in a case concerning a parent-child relationship and because it closely resembles the characteristics of the luggage bag in *Owens*. *See Owens v. State*, 322 Md. 616, 631, 689 A.2d 59, 66 (1991) (involving the search of a luggage bag that "was zippered closed, and its contents were not exposed to public view").

748. *See id.* (holding that a tenant's consent to a search of her apartment authorized police to obtain a zippered luggage bag, but that such consent did not authorize a search of the contents of the bag). It is important to remember that, in these hypotheticals, it is assumed that the parent has no right of access of his or her own to the item being searched. When the parent has an individual right of access to the container, that right of access establishes the common authority over the container and validates a search of its contents. *See United States v. Matlock*, 415 U.S. 164, 171 n.7 (1974) (requiring a "mutual use" of the particular property searched). Often a parent's right to access the container will provide the requisite authority to consent to a search. *See Frazier v. Cupp*, 394 U.S. 731, 740 (1969) (holding that a person's authority to use part of a bag authorizes him to consent to a search of the entire bag).

749. *See Owens*, 322 Md. at 630-31, 689 A.2d at 65-66 (concluding that a third party must have some authority over a luggage bag that was "zippered closed" to validly consent to a search of its contents).

750. *See id.* (noting that defendant "had an expectation of privacy in the bag which society is prepared to recognize as reasonable").

751. *See id.*

752. *See id.*

house, if the container is one that maintains the child's expectation of privacy in the contents of the container, a parent cannot validly consent to a search of the container.⁷⁵³ Therefore, the parent's authority to consent to a search of the room will not extend to the contents of the container or personal effect when the container affords the child an expectation of privacy beyond the child's privacy interest in the room.

c. Variation of the Room and Container Simultaneously.—Now suppose that both variables are allowed to change simultaneously. As just explained, if the container is of a type that protects the contents from others, the parent cannot validly consent to a search of the container.⁷⁵⁴ Therefore, in any search of a child's personal effects, if the personal effect is a container that sufficiently protects the privacy interests of the child, that protection becomes the determinative factor. The parent's consent is invalid because the parent maintains no authority over the particular effect. In the case of items such as clothing, however, it is possible that the level of privacy is affected by the room in which the item is located.

In analyzing any search of a child's personal effects conducted pursuant to parental consent, when the child is present and objects to the search, and the parent has no common authority over the personal effects, there are two factors to analyze. First, a court must consider whether the parent has the authority to consent to a search of the room.⁷⁵⁵ Second, a court must determine if the personal effect should be considered distinct from the room.⁷⁵⁶ For example, suppose the search is of a child's backpack found on the floor of the child's room, the child is a minor, and the parent has the right to enter the room. Also, as in all of the hypotheticals above, the parent has no right of access to the backpack.⁷⁵⁷ Although the parent has the

753. *See id.* (holding that although the homeowner had the authority to consent to the search of the home, she lacked similar authority over the luggage bag left in her home).

754. *See supra* notes 735-740 and accompanying text.

755. Alternatively, the search of the room could be upheld under the doctrine of apparent authority. *See supra* note 588 (noting that, pursuant to the doctrine of apparent authority, a search is valid, regardless of an individual's actual authority to consent, if police reasonably believed that the individual had such authority).

756. *See supra* notes 684-689 and accompanying text (describing the *Tariq* court's failure to distinguish between the search of the room and the search of the vest).

757. When a parent is given access to the bag, the parent is a co-user of the bag and has common authority to consent to searches. One question which might arise in this scenario, assuming the child objects to the search of the bag, is whether the parent's superior authority in some way includes the bag so that the parent, on similar reasoning as used in searches of bedrooms, can override the objection of the child. Often the facts of a particular case will lead a court to conclude that the parent can, in their own right, consent to a

authority to consent to a search of the room, that authority does not appear to extend to the contents of the backpack.⁷⁵⁸

Instead, suppose that the search is of a plastic videocassette container located in the child's room.⁷⁵⁹ Also, assume the child pays rent for the use of the room in his parent's house and the mother enters once a week to do the child's laundry. First, the parent must possess the superior authority over the child's room to consent to a search of the area.⁷⁶⁰ As discussed earlier, when the parent has access to the child's room, the parent has authority to consent to a search of the room.⁷⁶¹ Furthermore, even though the child pays rent, a court is likely to determine that the parent exercises superior authority over the room, enabling the parent to consent to a search over the objection of a child.⁷⁶² Second, the container searched is not of a type that a court is likely to conclude protects the child's expectation of privacy.⁷⁶³ Therefore, like the search in *Tariq*, a search of the room in this hypothetical would include the videocassette container.⁷⁶⁴ Because the search of the room is valid, the subsequent search of the videocassette container is also valid. In addition, the examples discussed above, though encompassing a very narrow set of fact patterns, may be helpful in predicting a court's treatment of a variety of third-party consent cases. While the aforementioned examples involved

search of the contents of the bag. See *Frazier v. Cupp*, 394 U.S. 731, 740 (1969) (upholding the search of a bag because the party that gave consent had permission to use a compartment of the bag). When a parent commonly cleans out or uses the child's bag, as may often be the case, the parent has common authority over the bag. See *United States v. Matlock*, 415 U.S. 164, 171 n.7 (1974) (noting that common authority is based on "mutual use of the property by persons generally having joint access or control for most purposes"). The court may determine that the parent's control over the bag determines their authority to consent. See *Frazier*, 394 U.S. at 740 (concluding that the joint use of a bag established the authority to consent to a search of the bag).

758. See *Owens*, 322 Md. at 630-31, 589 A.2d at 65-66 (holding that authority to consent to a search of the premises does not automatically equate to an authority to consent to a search of a zippered luggage bag located on the premises); see also *supra* notes 747-757 and accompanying text.

759. For an example of a court's treatment of such a container, see *United States v. Robinson*, 999 F. Supp. 155, 162 (D. Mass. 1998) (noting that "[a] plastic movie box is not the type of container that has historically been regarded as having a high expectation of privacy").

760. See *supra* note 684 and accompanying text (discussing the mother's superior authority in *Tariq*).

761. See *supra* notes 608-613 and accompanying text (discussing a case in which the court held that a mother's access to her child's room authorized her to consent to a search of the room).

762. See *supra* notes 723-725 and accompanying text.

763. See *supra* note 759 (discussing *Robinson*, 999 F. Supp. at 162).

764. See *Robinson*, 999 F. Supp. at 162 (declining to distinguish between the search of a room and the search of a videocassette container in the room).

searches conducted over the objection of the child, they nonetheless provide insight into a court's likely treatment of searches where the child does not object. In addition, the hypotheticals provide a framework on which to build arguments for all parental consent cases, as well as many third party consent cases not involving parent and child.

5. *Conclusion.*—*Tariq* establishes a parent's ability to grant valid consent for a police search of a child's belongings over the objection of the child.⁷⁶⁵ However, that ability is not as substantial as the *Tariq* holding might suggest. Although a parent will generally maintain superior authority over all of the rooms in his or her home, that superior authority, alone, will not always validate a search of a child's personal effects.⁷⁶⁶ This conclusion rests primarily on the determination that the court treated the search of the vest as inclusive in the search of the room.⁷⁶⁷ Not all personal effects, however, are afforded such treatment.⁷⁶⁸ As the analysis suggests, the characteristics of the personal effects will most often be the determinative factor in any search under these circumstances.⁷⁶⁹ Such characteristics, and the corresponding protection that the personal effect provides may, however, be affected by the location of the item.⁷⁷⁰ One must keep in mind that children are protected under the Fourth Amendment and the Court of Appeals has given no indication that one's status as a minor in any way affects the scope of such protection.⁷⁷¹ Instead, the court bases the parent's ability to override a child's objection on the doctrine of superior authority.⁷⁷²

DAVID W. STAMPER

765. See *supra* notes 659-660 and accompanying text (discussing the *Tariq* holding).

766. See *Tariq*, 347 Md. at 495, 701 A.2d at 696 ("There may also be cases, however, in which a parent's consent to search would not be valid in the face of the child's objection.").

767. See *supra* notes 682-683 and accompanying text.

768. See *supra* notes 614-621 and accompanying text (discussing the court's different treatment of a luggage bag in *Owens v. State*, 322 Md. 616, 589 A.2d 59 (1991)).

769. See *supra* note 750 and accompanying text (noting that an important consideration is whether the container is one for which society is prepared to recognize an expectation of privacy).

770. See *supra* notes 700-729 and accompanying text (examining the possible effect that the location of a child's vest has on a parent's authority to consent to a search of the vest).

771. Though the court does not explicitly limit a minor's rights under the Fourth Amendment, the superior authority and assumption of risk doctrines may, practically speaking, have just such an effect. See *supra* note 728 and accompanying text (noting that the court's reliance on the mother's superior authority to justify a search effectively leaves the child no place where his privacy is protected by the Fourth Amendment).

772. See *supra* notes 675-682 and accompanying text.

VI. ESTATES AND TRUSTS

A. *Declining to Apply the Doctrine of Dependent Relative Revocation*

In *Kroll v. Nehmer*,¹ the Court of Appeals refused to apply the doctrine of dependent relative revocation² and allow probate of a will that a testator³ had revoked under the mistaken belief that her later will was valid.⁴ The court held that application of the doctrine was not proper in this case because the “dispositive schemes” between the revoked will and the invalid will were vastly different.⁵ In reaching this conclusion the court was careful not to dismiss the possibility that dependent relative revocation might be applicable in the future under proper circumstances.⁶ However, the decision implies that any use of the doctrine in Maryland would likely occur under a traditionally rigid application of testamentary formalities.⁷ This ruling, while proper within the framework of Maryland precedent, begs the question whether judicial or legislative action is appropriate to better fulfill the desires of some testators in the future.

1. *The Case*.—On July 24, 1980, Margaret Binco (Binco) executed the first of four wills (the 1980 will).⁸ Approximately five years later, on April 12, 1985, she visited an attorney and executed a second

1. 348 Md. 616, 705 A.2d 716 (1998).

2. Dependent relative revocation is a doctrine under which a court can invalidate a testator's valid will revocation in certain circumstances. See 2 WILLIAM J. BOWE & DOUGLAS H. PARKER, PAGE ON THE LAW OF WILLS § 21.57, at 446 (rev. ed. 1960). Generally, there are two fact patterns where the doctrine may be appropriately applied: (1) *Conditional revocation*, where the testator intends his revocation to be final only upon the happening of a condition that never takes place, see Joseph Warren, *Dependent Relative Revocation*, 33 HARV. L. REV. 337, 338 (1920); and (2) *Revocation by act to the document under a mistake*, where a testator “cancels his will by act under the impression that he has made another valid testamentary disposition” (when in fact he has not), see *id.* at 342. *Kroll* follows the latter fact pattern.

3. Hereafter, the term “testator” shall be used to refer to either a testator or a testatrix.

4. *Kroll*, 348 Md. at 618, 705 A.2d at 717.

5. *Id.* at 631-32, 705 A.2d at 723.

6. *Id.* (noting that “[w]e need not decide in this case whether the doctrine of dependent relative revocation, as articulated [in this case], is part of Maryland law and, if it is, the circumstances under which it may properly be applied,” since “it cannot be applied under the circumstances of this case”).

7. See *id.* at 628, 705 A.2d at 722 (“This case presents for the first time a situation in which the doctrine might be applied and in which other courts have applied it. It is not a situation, however, in which we believe it appropriate to apply the doctrine.”).

8. *Id.* at 617, 705 A.2d at 716. The court noted that “the 1980 will is not in the record before us, but, from a comment made during the hearing in the circuit court, it appears that [appellant Henry J. Kroll] was left a car in that will.” *Id.* at 621, 705 A.2d at 718.

will (the 1985 will).⁹ The 1985 will divided Binco's estate among six beneficiaries and three charitable organizations,¹⁰ and named one of the beneficiaries as her personal representative.¹¹

Binco again revised the testamentary disposition of her estate in 1990.¹² This will (the 1990 will) lacked witness signatures and a residuary bequest, and was handwritten with numerous margin notes.¹³ Binco did not include any of the individual legatees named in the 1985 will in the 1990 will.¹⁴ She also named new executors.¹⁵ Upon creating the 1990 will, Binco wrote "VOID—NEW WILL DRAWN UP 6-28-90" on the back of the 1985 will.¹⁶ However, she did not mention any of the earlier wills in the 1990 will.¹⁷

Binco's fourth and final will was dated October 27, 1994 (the 1994 will).¹⁸ Like the 1990 will, the 1994 will lacked witness signatures, lacked a residuary bequest, lacked any mention of previous wills, and was handwritten.¹⁹ In this final will, Binco listed as beneficiaries many of the same individuals and charitable organizations named in the 1990 will.²⁰ One of the two executors named in the 1994 will had also been named an executor in the 1990 will.²¹

9. *Id.* at 617, 621, 705 A.2d at 716, 718; see Joint Record Extract at 6, *Kroll v. Nehmer*, 348 Md. 616, 705 A.2d 716 (1998) (No. 53).

10. *Kroll*, 348 Md. at 621-22, 705 A.2d at 718-19. In the 1985 will, Binco left much of her personal property to Charmaine Kilmartin, Esther Strebech, Betty Ball, Joan Romanowski, Phyllis Butler and Frances Hogarth. *Id.* at 621, 705 A.2d at 718. She left some stocks to the First Church of God, Lutheran Social Services of Maryland, and Spay and Neuter All Pets, Inc. *Id.* at 622, 705 A.2d at 718. Her estate's residuary was to benefit equally St. John's Lutheran Church, the First Church of God, and Spay and Neuter All Pets, Inc. *Id.*, 705 A.2d at 718-19.

11. *Id.* at 622, 705 A.2d at 719. In the 1985 will, Binco named Joan Romanowski as her personal representative. *Id.*

12. *Id.* at 617, 705 A.2d at 716.

13. *Id.* at 622, 705 A.2d at 719.

14. *Id.* In the 1990 will, Ms. Binco made a variety of bequests to "Richard," "Sharyn," "Chris," "Bea," and "Pat." *Id.* The court had evidence that "Richard" was Richard Kroll; "Sharyn" was Sharyn L. Trent; "Pat" was Pat Sonneborn; and "Bea" was Bea Reynolds. *Id.*

15. *Id.* In the 1990 will, Binco named Pat Sonneborn, Bea Reynolds, and "Hank," whom the court thought might be the appellant, Henry Kroll, as her executors. *Id.*

16. *Id.* at 618, 705 A.2d at 716.

17. *Id.* at 623, 705 A.2d at 719.

18. *Id.* at 617, 705 A.2d at 716.

19. *Id.* at 622-23, 705 A.2d at 719.

20. See *id.*, 705 A.2d at 718-19 (noting that in the 1994 will, Ms. Binco devised her property to Pat Sonneborn, Bea Reynolds, Richard Kroll, the First Church of God, and Friends of Animals).

21. See *id.* at 623, 705 A.2d at 719. In the 1994 will, Ms. Binco named Pat Sonneborn and Richard Kroll as executors. *Id.*

Binco died on December 19, 1994.²² Subsequently, Richard Kroll (Binco's nephew) submitted the 1990 will for probate.²³ The appellee²⁴ then submitted the 1980 will to the court for probate.²⁵ During the March 14, 1995 probate hearing, the appellant, Henry Kroll (Kroll), Binco's brother and closest surviving relative, produced the 1985 will, which was admitted to probate.²⁶ The appellee was appointed as personal representative.²⁷ Kroll filed a caveat to the 1985 will,²⁸ claiming testamentary incapacity, fraud, and undue influence regarding the 1985 will and contending that Binco had revoked the 1985 will;²⁹ the orphans' court dismissed Kroll's claims "without assigning any reasons."³⁰ The circuit court affirmed the orphans' court's admission of the 1985 will, holding that "the revocation of the April 12, 1985 Will was so related to the making of the June 28, 1990 Will as to be dependent on it"; therefore, because the 1990 will was invalid the 1985 will should be given effect.³¹

Kroll appealed, and the Court of Appeals granted *certiorari* sua sponte prior to any proceeding in the Court of Special Appeals to consider whether the doctrine of dependent relative revocation had been properly applied by the lower court.³²

22. *Id.* at 617, 705 A.2d at 716.

23. *Id.* at 623, 705 A.2d at 719.

24. The appellee was the pastor of St. John's Lutheran Church, one of the beneficiaries under Binco's 1985 will. *Id.*

25. *Kroll*, 348 Md. at 623, 705 A.2d at 719.

26. *Id.* (stating that the orphans' court "apparently appl[ied] the doctrine of dependent relative revocation" in admitting the 1985 will to probate). The orphans' court rejected Binco's 1990 will for probate, holding that "it does not satisfy the statutory requirement of a valid will and is not in good form." *Id.* at 623-24, 705 A.2d at 719. Additionally, the 1990 and 1994 wills were ineffective "because they lack[ed] the signatures of attesting witnesses, as required by Maryland Code, Estates and Trusts Article, § 4-102." *Id.* at 618, 705 A.2d at 716-17; *see also* MD. CODE ANN., EST. & TRUSTS § 4-102 (1991) (setting forth the requirements for a valid will in Maryland).

27. *Kroll*, 348 Md. at 623, 705 A.2d at 719.

28. A caveat is "A formal notice or warning given by a party interested to a court . . . against the performance of certain acts within [its] power and jurisdiction." BLACK'S LAW DICTIONARY 222 (6th ed. 1990). It is used in estate matters "to prevent . . . the proving of a will." *Id.*

29. *Kroll*, 348 Md. at 623, 705 A.2d at 719.

30. *Id.*

31. *Id.* at 624, 705 A.2d at 720 (internal quotation marks omitted) (quoting the opinion of the circuit court).

32. *Id.* at 618, 705 A.2d at 717.

2. *Legal Background.*—

a. *Introduction.*—The role of the court in a probate case is to ascertain and carry out the will of the testator.³³ The court is at the same time guided and constrained by the formalities of probate statutes, as well as by a lack of empowerment either “to write a will for [the testator or] structure a will that differs from any will which [the testator] ever executed.”³⁴ Sometimes, a testator’s clear preference cannot be probated owing to the testator’s failure to fulfill these formalities. In these situations, the doctrine of dependent relative revocation³⁵ helps courts to nevertheless give effect to the intent of a testator.³⁶

The court in *Semmes v. Semmes*³⁷ illustrated one fact pattern that would trigger application of the doctrine:

[W]here a man having duly executed one will, afterwards causes another to be prepared, and supposing the second to be duly executed, under that impression alone cancels the first. In such case it has been held, that on the second turning out not to have been duly executed, the canceling the first, being done by mistake and misapprehension, would not operate as a revocation.³⁸

It is in this way that a testator’s revocation of an old will is nullified.

In applying dependent relative revocation, the court presumes that the testator would not have wanted her old will to be revoked if she had known that the new will would not be allowed probate.³⁹ But this presumption sets up a fiction.⁴⁰ The court acts as if the testator

33. See Warren, *supra* note 2, at 351 (noting that in order to allow the probate court to determine the intent of the testator “we must be willing to accept an occasional instance of injustice for the sake of a sound result in a majority of the cases”).

34. *Arrowsmith v. Mercantile-Safe Deposit*, 313 Md. 334, 350, 545 A.2d 674, 682 (1988).

35. See *supra* note 2 (describing the doctrine of dependent relative revocation and its application).

36. 2 BOWE & DOUGLAS, *supra* note 2, § 21.57, at 450 (noting that the decision to apply the doctrine of dependent relative revocation to preserve an earlier, revoked will should be based on how a “testator’s final intention can best be given effect”).

37. 7 H. & J. 388 (Md. 1826).

38. *Id.* at 390-91.

39. See Warren, *supra* note 2, at 347 (noting in a hypothetical involving a testator who has revoked an old will under the impression that he has created a new, valid will that “[t]he testator does not say to himself, ‘This is a revocation if the second disposition is valid,’ for he assumes that it is”).

40. See *id.* at 342 (noting that in a situation involving a revocation made with the assumption that the new instrument will be valid, the revocation is not truly conditioned or dependent upon the validity of the new will).

conditioned the revocation of her old will on her new will being found suitable for probate.⁴¹ In reality, the testator probably intended to revoke her old will unconditionally, believing erroneously that her new will would pass probate.⁴² As one prominent treatise states:

A mistaken frame of mind is really quite different from a conditional frame of mind, and it involves a needless and highly fictional process to pretend that an act unconditionally done by a person who never doubts the truth of the erroneous beliefs which motivate him is in reality done conditionally.⁴³

This "conditional intent analysis" was developed by the courts "as a means of giving relief against a [testator's] revocation induced by mistake."⁴⁴ But given the potential havoc such an equitable principle could wreak upon established law were it given broad application,⁴⁵ and given the possibility that "policies that underlie the refusal of such relief would be wholly undercut,"⁴⁶ courts have almost universally refused to apply the doctrine of dependent relative revocation "where the revocation was not connected with some alternative plan for succession to the decedent's estate or part of it, and the plan failed to take effect."⁴⁷ This limitation by the courts serves as the outer boundary of the doctrine, beyond which it will not be applied.⁴⁸

Within that outer boundary, the creation of this conditional intent in a testator's decision causes a court to focus much of its analysis on the state of mind of the testator, and whether she really would have wanted her old, revoked will to be revived had she known that her new will would fail probate.⁴⁹ Courts look at "all of the relevant circumstances surrounding the revocation," such as how completely the

41. See 2 BOWE & PARKER, *supra* note 2, § 21.57, at 446 (stating that courts often apply the doctrine of dependent relative revocation to situations such as these where "the revocation is carried out because of a purely mistaken frame of mind rather than a conditional frame of mind; but the courts still persist in [treating it as] a conditional revocation").

42. See *id.* ("[H]ere there is no question but that the testator intends to revoke his will. He is, however, induced to do so by a misapprehension of law or of fact.").

43. *Id.*

44. George E. Palmer, *Dependent Relative Revocation and Its Relation to Relief for Mistake*, 69 MICH. L. REV. 989, 990 (1971).

45. See *id.* (noting that "if [the principle] were to be applied to every case of mistake, the dangers would be the same as though the court gave relief through the traditional method of setting aside a transaction because of mistake").

46. *Id.*

47. *Id.*

48. See *id.* ("This provides an almost completely settled outer limit for the doctrine.").

49. See Warren, *supra* note 2, at 345 ("The inquiry should always be: What would the testator have desired had he been informed of the true situation?").

act of cancellation was carried out by the testator, the manner that the testator chose to revoke the will, the unity between revocation and the creation of a new will, the similarities and differences between the two wills, and any parol evidence that sheds light on the testator's true intentions.⁵⁰

The breadth of this analysis by a court applying dependent relative revocation may prompt questions about a court's justification for so testing the bounds of the statutory probate formality constraints.⁵¹ Answers to these questions can only be developed after an analysis of the purposes behind statutory will formalities.

b. Purpose of Statutory Will Formalities.—Will formalities can be justified as serving four social policies: (1) cautionary, (2) evidentiary, (3) protective, and (4) channeling.⁵² The cautionary, or ritual, function ensures that the testator is aware of the significance of her testamentary transfer.⁵³ This awareness on the part of the testator is essential to guarantee that "dispositive effect" is only given to words that the testator intended to attach such importance.⁵⁴ It is thought that the formality required in testamentary dispositions has this impact on a testator,⁵⁵ thus assuring the court in a probate situation that

50. *Kroll*, 348 Md. at 629, 705 A.2d at 722.

51. See *infra* note 69 (listing the pertinent Maryland provisions governing the creation and validity of testamentary instruments).

52. See JESSE DUKEMINIER & STANLEY M. JOHANSON, *WILLS, TRUSTS AND ESTATES* 206-07 (5th ed. 1995) (outlining the four public policy reasons that will formalities support, and noting that all states have some variation of either the English Statute of Frauds of 1677 or the English Wills Act of 1837 governing testamentary transfers); John H. Langbein, *Excusing Harmless Errors in the Execution of Wills: A Report on Australia's Tranquil Revolution in Probate Law*, 87 COLUM. L. REV. 1, 3 (1987) [hereinafter Langbein, *Excusing Harmless Errors*] (noting the "evidentiary, cautionary, and protective policies" served by will formalities); see also Ashbel G. Gulliver & Catherine J. Tilson, *Classification of Gratuitous Transfers*, 51 YALE L.J. 1, 5-10 (1941) (outlining the ritual [cautionary], evidentiary and protective functions served by wills formalities); John H. Langbein, *Substantial Compliance with the Wills Act*, 88 HARV. L. REV. 489, 494 (1975) [hereinafter Langbein, *Substantial Compliance*] (describing a fourth policy served by wills formalities, the channeling function).

53. See DUKEMINIER & JOHANSON, *supra* note 52, at 206 ("The formalities of transfer therefore generally require the performance of some ceremonial for the purpose of impressing the transferor with the significance of his statements . . ."); Gulliver & Tilson, *supra* note 52, at 5 (noting that the "ceremonial precludes the possibility that the testator was acting in a casual or haphazard fashion").

54. See Gulliver & Tilson, *supra* note 52, at 3-4 (suggesting that these ceremonial requirements guard against attaching a "dispositive effect" to casual language not meant to have legal effect).

55. See *id.* at 4 (noting that the formalities of transfer also have the purpose of "impressing the testator with the significance of his statements").

“the statements of the transferor were deliberately intended to effectuate a transfer.”⁵⁶

Will formalities also serve an evidentiary function.⁵⁷ By complying with these formalities, the testator “may increase the reliability of the proof presented to the court” in establishing the desire of the testator.⁵⁸ Thus, the court will be more likely to have legitimate evidence of the true desire of the testator at its disposal in making a probate decision.⁵⁹

The third social policy that will formalities serve is protection of the testator’s wishes by lessening the chance that the testator made her last will and testament under subversion or improper duress.⁶⁰ Society seeks to prevent a testator from being “coerced into doing that which he or she does not desire to do.”⁶¹ Finally, will formalities serve a channeling purpose by providing assurances to the testator that her intentions will be fulfilled.⁶² The formalities provide uniformity, allowing courts to consistently probate wills in a predictable manner.⁶³ This consistency in turn allows a testator planning her estate to have confidence that what she has planned for her property will come to pass.⁶⁴

Questions have arisen as to whether the public good is best served by rigid adherence to will formalities. For example, courts are often in the position of being “perfectly satisfied that [a] document was intended by the deceased to be executed as his will and that its contents represent testamentary intentions,” but still ruling against the understood intentions of the deceased.⁶⁵ While disregarding the known intention of a testator would at first blush seem to violate public policy,

56. *See id.* at 3.

57. *See id.* at 6.

58. *See id.* at 4. While recognizing that “[t]he extent to which the quantity and effect of available evidence should be restricted . . . is . . . a controversial matter,” Gulliver and Tilson nonetheless argue that whatever decision is made with regard to allowable evidence, “the existing requirements of transfer emphasize the purpose of supplying satisfactory evidence to the court.” *Id.*

59. *See id.* at 6-7 (noting that will formalities such as requiring the will to be in writing and signed by the testator help to demonstrate the intent of the testator while preventing “unauthenticated or fraudulent additions” to the will).

60. *See id.* at 9 (“Some of the requirements of the statutes of wills have the objective . . . of protecting the testator against imposition at the time of execution.”).

61. *See* Wingrove v. Wingrove, 11 P.D. 81, 83 (P. Div’l Ct. 1885).

62. *See* Langbein, *Substantial Compliance*, *supra* note 52, at 494 (suggesting that will formalities absolve the testator of worry as to whether the mode of communicating his testamentary wishes will be effective).

63. *See id.*

64. *See id.*

65. *See In re Groffman*, 1 W.L.R. 733, 735, 739 (1969).

upon closer examination, this apparent disregard for a testator's intentions is caused by rigid application of will statutes and may be justifiable if such application provides a greater benefit to society at large than the wrong dealt to testators who fail to clear the formalities hurdle.⁶⁶

c. *Statutory Framework Around the Doctrine.*—The public policies discussed above are evident in the three Maryland statutes that most directly limit the doctrine of dependent relative revocation: section 4-102, Writing; signature; attestation,⁶⁷ section 4-105, Revocation of a will,⁶⁸ and section 4-106, Revival of a will.⁶⁹

d. *The History of the Doctrine.*—One of the earliest and most defining cases applying the doctrine of dependent relative revocation was the English case of *Onions v. Tyrer*.⁷⁰ Tyrer made a properly executed will detailing the testamentary disposition of his realty.⁷¹ He later made a second will that revoked the first and effected minor changes as to the disposition of his real estate.⁷² However, as Tyrer was bedridden when he drafted his second will and there was no place in his room for the three witnesses to sign, they signed out of sight of the testator. The failure to sign in the testator's presence invalidated the will.⁷³ Tyrer then had his wife destroy the first will.⁷⁴ The court

66. See *supra* notes 52-64 and accompanying text (outlining the societal benefits of adhering to will formalities).

67. MD. CODE ANN., EST. & TRUSTS § 4-102 (1991). This section requires that: Except as provided in §§ 4-103 [holographic will] and 4-104 [will made outside Maryland], every will shall be (1) in writing, (2) signed by the testator, or by some other person for him, in his presence and by his express direction, and (3) attested and signed by two or more credible witnesses in the presence of the testator.

Id.

68. *Id.* § 4-105. This section states:

A will, or any part of it, may not be revoked in a manner other than as provided in this section. . . . (2) *Destruction.*—By burning, canceling, tearing, or obliterating the same, by the testator himself, or by some other person in his presence and by his express direction and consent.

Id.

69. *Id.* § 4-106. This section states:

If a testator makes a subsequent will intended to revoke a prior will, the destruction or other revocation of the subsequent will does not revive the prior will unless the will is still in existence and is republished with the same formalities as are required for the execution of a will in this subtitle.

Id.

70. 2 Vern. 741 (1716).

71. *Id.* at 741. The will was properly attested by three witnesses. *Id.*

72. *Id.* at 741-42.

73. *Id.* at 742.

held that since Tyrer's second will was invalid, the revocation clause therein was also invalid.⁷⁵ The court also held that owing to the similarity between Tyrer's two wills, Tyrer most likely would have preferred his first will to intestacy.⁷⁶ In reaching this conclusion, the *Tyrer* court found it clear that Tyrer revoked his first will "only upon a supposition that he had made a latter will at the same time, and both wills, as to the main, were much to the same effect."⁷⁷ As such, the court set aside Tyrer's revocation of the first will and allowed it to stand.⁷⁸

The English courts later applied *Onions* in *Tupper v. Tupper*.⁷⁹ The testator had devised gifts to certain charities in his 1851 will.⁸⁰ Later, in an 1853 codicil, he explicitly revoked these gifts and instead made a gift to another charity.⁸¹ The codicil, having been found to violate the law, was held to be void.⁸² The question before the court was whether to uphold the testator's revocation of his earlier will.⁸³

The *Tupper* court began by looking at *Onions*, where the court had found revocation of the old will bound to the attempted creation of a new will.⁸⁴ The *Tupper* court concluded that it could not find a similar bond. Although both the 1851 and 1853 gifts benefitted charitable parties, they were different charitable benefactors.⁸⁵ Without such a bond, the court found no indication of an intention by the testator that "the legatees whose legacies he revoke[d] should remain recipients of his bounty."⁸⁶ Accordingly, the court upheld the testator's revocation of his 1851 bequests.⁸⁷

74. *Id.*

75. *Id.*

76. *Id.* at 742-43. The court also raised minor doubt as to Tyrer's revocation. *Id.*

77. *Id.*

78. *Id.* at 743.

79. 1 K. & J. 665 (1855).

80. *Id.* at 666 (noting that the testator had made various charitable bequests totaling £850 to the treasurers for the time being of the Missionary College of Saint Augustine at Canterbury, the Society for Promoting the Employment of Additional Curates in Populous Places, and the Tithe Redemption Trust).

81. *Id.* at 666-67 (noting that in his codicil, the testator explicitly revoked the charitable bequests from his earlier will totaling £850; "in lieu thereof," testator bequeathed £1000 to the treasurer for the time being of the House of Charity in Rose Street, Soho).

82. *Id.* at 670 (noting that "[t]he law prevents the particular object which [the testator] has designated [in his codicil] from taking anything").

83. *Id.* at 667-68 (giving arguments by executors and the codicil charity beneficiary as to why the testator's revocation should be upheld or stricken).

84. See *supra* notes 70-78 and accompanying text (describing *Onions v. Tyrer*).

85. *Tupper*, 1 K. & J. at 666-67 (listing beneficiaries under the 1851 will and the 1853 codicil).

86. *Id.* at 670.

87. *Id.*

In *Quinn v. Butler*,⁸⁸ a testator had written a will exercising his power of appointment in favor of his son and three daughters. He later wrote a codicil revoking this bequest and bequeathing the legacy entirely to his son.⁸⁹ When the bequest in this codicil was found to be unenforceable,⁹⁰ the court was asked whether the revocation in the codicil was unenforceable as well.⁹¹ The court began by looking at the connection between the testator's revocation and his new distribution.⁹² Relying on *Onions v. Tyrer*,⁹³ the court held that the testator's intention was to first revoke his prior will, and then make a codicil gift to his son; the revocation was not conditioned on the validity of the testator's bequest under his codicil.⁹⁴ Thus, the court was unwilling to apply dependent relative revocation to cancel the revocation. The portion of the codicil revoking the 1856 will bequest was upheld, while the portion of the codicil creating an alternative bequest was held to be void.⁹⁵

Onions and its progeny establish that the English equity courts were willing to consider the intent of the testator in the process of interpreting will revocations and subsequent gifts. If the courts determined that the testator had intended for her revocation and subsequent gift to be part of one continuous act, and the gift failed, then the revocation was found to have failed as well. But if the revocation and subsequent gift were found to be independent actions, then the valid revocation was upheld, and the invalid gift was found void.

e. The Doctrine of Dependent Relative Revocation in Maryland.—Maryland courts have never applied the doctrine of dependent relative revocation,⁹⁶ but they have considered it on three occasions prior to *Kroll*.⁹⁷ The issue of when, if ever, the doctrine should be applied in Maryland first arose in *Semmes v. Semmes*.⁹⁸ In *Semmes*, the deceased made a will devising his entire estate in trust to his wife until his son

88. L.R. 6 Eq. 225 (1868).

89. *Id.* at 225-26.

90. *Id.* at 228.

91. *Id.* at 226-27.

92. *Id.* at 227-28.

93. *Id.* at 227 ("If a will is simply revoked in order to make a gift in favor of another person, and you can see that there is no intention to revoke unless for that purpose, then the doctrine of *Onions v. Tyrer* applies. The case has generally arisen when there has been a defective execution of the second instrument.").

94. *Id.*

95. *Id.* at 228.

96. *Kroll*, 348 Md. at 619, 705 A.2d at 717.

97. *Id.* at 625, 705 A.2d at 720.

98. 7 H. & J. 388 (Md. 1826).

reached twenty-one, at which point half of his estate would go to his son and half to his wife.⁹⁹ When his wife predeceased him, he wrote on his will “[i]n consequence of the death of my wife, it is [sic] become necessary to make another will,” and signed it.¹⁰⁰ He then crossed out his and all the witnesses’ signatures.¹⁰¹ He failed to make another will before his death, and when he died his original will was presented for probate.¹⁰²

The court was faced with deciding whether Semmes’ deliberate, intentional revocation of his will was valid.¹⁰³ After reviewing *Onions v. Tyrer*, the court concluded that for dependent relative revocation to apply, a testator must have revoked his will upon the mistaken belief that a later created will was legitimate.¹⁰⁴ Because Semmes had not created a later will, the doctrine was inapplicable.¹⁰⁵ Thus, the court upheld the testator’s revocation of his will.¹⁰⁶

The Court of Appeals next considered the doctrine of dependent relative revocation in *Safe Deposit & Trust Co. v. Thom*.¹⁰⁷ Anne Lowe Rieman died on March 3, 1911, leaving two daughters and three sons.¹⁰⁸ Rieman’s will directed that each of her surviving children was to receive \$10,000 outright.¹⁰⁹ The will devised the majority of Rieman’s residuary estate to a trust, with each of Rieman’s children receiving one-fifth of the income from the trust quarterly.¹¹⁰ If one of the children died, the trust was to be divided, with each of the five children, or his or her living issue, receiving a one-fifth share per capita.¹¹¹

Rieman later changed her mind and decided to give each child their one-fifth share outright, thus abolishing the trust and bequest arrangement.¹¹² On June 28, 1910, Rieman notified her attorney of the change, and told her attorney that because her children would get their shares of her estate absolutely under the new will, Rieman had

99. *Id.* at 391.

100. *Id.* at 389.

101. *Id.*

102. *Id.* at 391.

103. *Id.* (commenting upon Semmes’ actions that “[i]f that was not a revocation, it would be found difficult to revoke a will by canceling”).

104. *Id.* at 390-91.

105. *Id.*

106. *Id.* at 391.

107. 117 Md. 154, 83 A. 45 (1912).

108. *Id.* at 155, 83 A. at 45.

109. *Id.* at 157, 83 A. at 46.

110. *Id.* at 158, 83 A. at 46.

111. *Id.*

112. *Id.* at 160, 83 A. at 47.

erased the provisions of her will detailing the \$10,000 bequests.¹¹³ Her attorney responded that Rieman should not attempt to change her will in this manner, and offered to draft a new will for Rieman as soon as she sent him a list of revisions.¹¹⁴ Apparently taking his advice, Rieman retraced in pencil some of the words that she had rubbed out.¹¹⁵

Mrs. Rieman died before she sent her attorney the list of revisions.¹¹⁶ Consequently, he had not prepared a new will for her.¹¹⁷ Rieman's estate was left with her old will, complete with its rub-outs and re-tracings, to bring to probate.¹¹⁸

The *Thom* court considered whether Rieman's erasure and retracing of items in her will operated to revoke the items in particular and the will in general.¹¹⁹ The court held that the erasure did not constitute revocation,¹²⁰ reasoning that in order for a cancellation to constitute revocation of the will, the cancellation must "clearly indicate an intention to revoke."¹²¹ Rather than view Mrs. Rieman's acts as an intent to clearly revoke, the court viewed her erasing and re-lining as an incomplete revocation.¹²² Since there was no revocation, there was no opportunity to consider applying the doctrine of dependent relative revocation. The court simply allowed probate of Rieman's old will.¹²³

In 1988, the issue of whether the doctrine of dependent relative revocation should be applied in Maryland resurfaced in *Arrowsmith v. Mercantile-Safe Deposit*.¹²⁴ In *Arrowsmith*, the testator, Frances Arrow-

113. *Id.* at 161, 83 A. at 47. During that conversation, Rieman also told Willis that in addition to changing the bequests to her children, she had some specific money legacies that she wanted to incorporate into the revised will. *Id.* at 160, 83 A. at 47. Willis responded that he would prepare a revised will as soon as Rieman sent him a list of the additional legacies. *Id.*

114. *Id.* at 160, 83 A. at 47.

115. *Id.* at 159-60, 83 A. at 47.

116. *Id.* at 160-61, 83 A. at 47.

117. *Id.*

118. *Id.*

119. *Id.* at 156, 83 A. at 46.

120. *Id.* at 166, 83 A. at 49.

121. *Id.* at 163, 83 A. at 48.

122. *Id.* ("Such an act is clearly too indefinite, too incomplete to form the foundation of a presumption that the testatrix intended thereby to revoke an instrument which she had executed with so much formality.")

123. *Id.* at 169, 83 A. at 50.

124. 313 Md. 334, 545 A.2d 674 (1988). The Court of Appeals considered three issues in this case: (1) whether the rule against perpetuities had been properly applied; (2) whether the doctrine of dependent relative revocation had been properly dismissed as a remedy to cure the perpetuities violation in a testator's will that did not share a perpetuities violation; and (3) whether a charitable contribution in the testator's will should be

smith, drafted an irrevocable deed of trust giving her son power of appointment over approximately \$7 million worth of assets.¹²⁵ He proceeded to exercise this power in his wills dated 1966, 1976, and 1982.¹²⁶ Each will contained a clause revoking the previous will.¹²⁷ In 1983, the son died, and his 1982 will was probated.¹²⁸ Upon examining this 1982 will, the circuit court held that a trust provision within the will, which operated under the testator's power of appointment granted him by his mother's 1953 trust, violated the rule against perpetuities.¹²⁹ Consequently, the court ordered that a default provision under Ms. Arrowsmith's 1953 deed of trust, which called for dividing the trust equally among her son's children, be put into effect.¹³⁰

The circuit court's ruling was appealed by takers under the 1982 will on three separate grounds,¹³¹ one of which was based on the doctrine of dependent relative revocation. The Unknowns, an appellant group made up of all possible unknown people with an interest in the son's will, argued that the court should apply the doctrine of dependent relative revocation to vitiate the rule against perpetuities violation presented by execution of the son's power of appointment in the 1982 will.¹³²

In the 1966 will, the son had established a trust for the benefit of his children similar to the trust in his 1982 will.¹³³ However, the 1966 will limited the duration of the trust to the lifetime of eleven lives in being at the creation of the trust,¹³⁴ thereby eliminating the perpetuities violation under the 1982 trust.¹³⁵ Citing the doctrine of dependent relative revocation, the Unknowns petitioned the Court of Appeals to make the 1982 will suitable for probate by bringing this provision forward and attaching it to the 1982 will.¹³⁶

void as a contract for lack of consideration or estoppel. *Id.* at 341, 351-52, 545 A.2d at 677-78, 682-83. Only the second issue is relevant here.

125. *Id.* at 337, 545 A.2d at 675.

126. *Id.*

127. *Id.*

128. *Id.*

129. *Id.* at 339, 545 A.2d at 676.

130. *Id.* at 340, 545 A.2d at 677.

131. *Id.* at 340-41, 545 A.2d at 677.

132. *Id.* Since the son's children were all childless, all possible unknown people (the Unknowns) who may have had an interest in his estate were represented by counsel. *Id.* at 339, 545 A.2d at 677.

133. *Id.* at 340, 545 A.2d at 677.

134. *Id.*

135. *Id.*

136. *Id.* at 340-41, 545 A.2d at 677.

The court began its analysis by reviewing the traditional purpose of the doctrine.¹³⁷ The court noted that dependent relative revocation was based on the idea that a court may correct a conditional revocation made by a testator.¹³⁸ This foundation limits the doctrine's breadth to situations where a court believes that a testator would have preferred a prior will to intestacy brought on by the failing of a later will.¹³⁹ The *Arrowsmith* court found no support for the Unknowns' proposition that the court could parse a will into individual bequests and compare each bequest with a similar bequest in a prior revoked will;¹⁴⁰ in the court's opinion, this would violate the purpose of the doctrine.¹⁴¹ Thus, the *Arrowsmith* court held that if dependent relative revocation were to apply at all, it would have the effect of using an earlier revoked will to usurp the 1982 will in its entirety.¹⁴²

Following this conclusion, the court outlined the logical progression that, given the facts in *Arrowsmith*, the court would need to follow in order to apply the doctrine.¹⁴³ First, the court would have to hold that the son preferred his 1976 will to his 1982 will.¹⁴⁴ Even if the court arrived at this conclusion, applying the doctrine would not help, because the 1976 will violated the rule against perpetuities for the same reason as his 1982 will.¹⁴⁵ Thus, the Unknowns would next have to show that the son would have preferred his 1966 will to his partially invalid 1976 will.¹⁴⁶ Only then would dependent relative revocation apply.¹⁴⁷ In applying the doctrine, the 1966 will would have to be admitted to probate in its entirety, completely replacing the 1982 will.¹⁴⁸

In addition to this rather tortured path of "un-revocations" that the court would need to accept, the court stated another reason for finding dependent relative revocation unsuitable in this case: there were "substantial differences" between some of the bequests made in the 1966 and 1982 wills which made the application of dependent rel-

137. *Id.* at 343-48, 545 A.2d at 679-81.

138. *Id.* at 348, 545 A.2d at 681.

139. *Id.*

140. *Id.* at 345, 350, 545 A.2d at 680, 682.

141. *Id.* ("Plucking the perpetuities savings clause from the 1966 will and inserting it in the 1982 is inconsistent with the theoretical justification for the doctrine [of dependent relative revocation].").

142. *Id.* at 349, 545 A.2d at 682.

143. *Id.*

144. *Id.*

145. *Id.* at 349-50, 545 A.2d at 682.

146. *Id.* at 350, 545 A.2d at 682.

147. *Id.*

148. *Id.*

ative revocation inappropriate.¹⁴⁹ For example, the son made sixteen bequests in his 1966 will to individuals that he omitted entirely from his 1982 will.¹⁵⁰ Also, only two of the sixteen charitable legatees in his 1982 will were also included in his 1966 will.¹⁵¹ The court noted that these and other substantial differences made it unlikely that the son "would have preferred the prior [1966] will to the result under the later [1982] will."¹⁵² Thus, the *Arrowsmith* court refused to apply the doctrine of dependent relative revocation.¹⁵³

f. The Doctrine of Dependent Relative Revocation in Other Jurisdictions.—Most states have had occasion to consider judicial application of the doctrine of dependent relative revocation.¹⁵⁴ In *McIntyre v. McIntyre*,¹⁵⁵ the Supreme Court of Georgia considered whether a duly executed will in which the testator had crossed out portions of the will in pencil and pasted pieces of paper over other portions of the will, sometimes with notations on the paper, was suitable for probate.¹⁵⁶

149. *Id.*

150. *Id.* at 350-51, 545 A.2d at 682.

151. *Id.* at 351, 545 A.2d at 682.

152. *Id.* at 348, 545 A.2d at 681.

153. *Id.* at 351, 545 A.2d at 683.

154. See *Franklin v. Bogue*, 17 So. 2d 405, 409 (Ala. 1944); *Larrick v. Larrick*, 607 S.W.2d 92, 95 (Ark. Ct. App. 1980); *In re Kaufman's Estate*, 155 P.2d 831, 834 (Cal. 1945); *Churchill v. Allesio*, 719 A.2d 913, 915 (Conn. App. Ct. 1998); *Bailey v. Kennedy*, 425 P.2d 304, 307 (Colo. 1967); *Ruth v. Ruth*, 123 A.2d 132, 134 (Del. Ch. 1956); *In re Jones*, 352 So. 2d 1182, 1185 (Fla. Dist. Ct. App. 1977); *McIntyre v. McIntyre*, 47 S.E. 501, 503 (Ga. 1904); *In re Heazle's Estate*, 240 P.2d 821, 823 (Idaho 1953); *In re Estate of Davies (Joranson v. Jacobs)*, 282 N.E.2d 528, 530 (Ill. App. Ct. 1972); *Roberts v. Fisher*, 105 N.E.2d 595, 599-600 (Ind. 1952); *Blackford v. Anderson*, 286 N.W. 735, 746-47 (Iowa 1939); *In re Kemper's Estate*, 145 P.2d 103, 112 (Kan. 1944); *Wallingford's Ex'r v. Wallingford's Adm'r*, 99 S.W.2d 729, 731 (Ky. 1936); *Smith v. Shaw*, 60 So. 2d 865, 866 (La. 1952); *In re Thompson*, 102 A. 303, 306 (Me. 1917); *Schneider v. Harrington*, 71 N.E.2d 242, 243 (Mass. 1947); *In re McKay's Estate*, 79 N.W.2d 597, 600 (Mich. 1956); *In re Estate of Anthony*, 121 N.W.2d 772, 779 (Minn. 1963); *Estate of Lyles*, 615 So. 2d 1186, 1191 (Miss. 1993); *Watson v. Landvatter*, 517 S.W.2d 117, 122 (Mo. 1974); *In re Guardianship & Conservatorship of Estate of Tennant*, 714 P.2d 122, 129-30 (Mont. 1986); *In re Ladman's Estate*, 259 N.W. 50, 53 (Neb. 1935); *In re Estate of Laura*, 690 A.2d 1011, 1014 (N.H. 1997); *In re Smalley's Estate*, 24 A.2d 515, 517 (N.J. Prerog. Ct. 1942); *In re Roeder's Estate*, 106 P.2d 847, 851-52 (N.M. 1940); *In re Macomber's Will*, 87 N.Y.S.2d 308, 312 (App. Div. 1949); *Shriners' Hosp. for Crippled Children v. Hester*, 492 N.E.2d 153, 157 (Ohio 1986); *In re Estate of Ausley*, 818 P.2d 1226, 1233 (Okla. 1991); *Flanders v. White*, 18 P.2d 823, 828 (Or. 1933); *In re Crook's Estate*, 130 A.2d 185, 188 (Pa. 1957); *Charleston Library Soc'y v. Citizens & Southern Nat'l Bank*, 20 S.E.2d 623, 627 (S.C. 1942); *Briscoe v. Allison*, 290 S.W.2d 864, 866 (Tenn. 1956); *Chambers v. Chambers*, 542 S.W.2d 901, 906 (Tex. Civ. App. 1976, no writ); *Bell v. Timmins*, 58 S.E.2d 55, 61-62 (Va. 1950); *In re Estate of Hall*, 499 P.2d 912, 914 (Wash. App. 1972); *In re Estate of Siler*, 187 S.E.2d 606, 615 (W. Va. 1972); *In re Rauchfuss' Estate*, 287 N.W. 173, 177 (Wis. 1939).

155. 47 S.E. 501 (Ga. 1904).

156. *Id.* at 502-03.

The court began its analysis by noting the express statutory provision in Georgia that when a will is obliterated in material part, a rebuttable presumption arises that the testator intended to revoke the will.¹⁵⁷ It then outlined the two elements that must be present for a testator to revoke a will: act and intention.¹⁵⁸ The court went on to note that when a testator revokes his old will, the fact that the testator meant to create a new will and did not, or created one that failed, does not alone justify the application of dependent relative revocation.¹⁵⁹ The revocation of the old will and creation of the new one must be "part of one scheme," and entirely dependent upon one another.¹⁶⁰ In *McIntyre*, the court did not find this union, a finding necessary to clearly rebut the presumption of intention to revoke that arises when material portions of a will have been crossed out.¹⁶¹ Thus, the court remanded the case for trial before a jury consistent with the court's opinion.¹⁶²

South Carolina applied the doctrine of dependent relative revocation in *Charleston Library Society v. Citizens & Southern National Bank*.¹⁶³ In that case, the testator bequeathed most of her estate to various charities through a will and a series of codicils.¹⁶⁴ Her will and first codicil bequeathed certain property in trust to the Charleston Library Society (CLS), with instructions to set up a memorial for her two brothers.¹⁶⁵ A later codicil revoked this legacy and bequeathed the property instead to a trust, the purpose of which was to set up a museum (the Ross Memorial) as a memorial to her two brothers.¹⁶⁶ The museum was ruled not to be a charity, and thus this legacy of the codicil violated the rule against perpetuities and could not be effectuated.¹⁶⁷ Confronted with the revocation of the library legacy, the court could either apply the doctrine of dependent relative revocation to revive the library bequest, or allow the revocation to stand and roll the bequest into the residual estate.¹⁶⁸ The South Carolina court chose the former.¹⁶⁹

157. *Id.* at 503.

158. *Id.*

159. *Id.*

160. *Id.*

161. *Id.* at 504.

162. *Id.*

163. 20 S.E.2d 623 (S.C. 1942).

164. *Id.* at 624.

165. *Id.* at 624-25.

166. *Id.* at 625.

167. *Id.* at 626.

168. *Id.*

169. *Id.* at 628.

The court looked at the will and codicils, and concluded that the overall intention of the testator was to give approximately three fourths of her estate to various hospitals and about one fourth to a cultural interest in memory of her deceased brothers.¹⁷⁰ Since her hospital legatees were the beneficiaries of her residual estate, rolling the legacy into the residual would have the effect of giving most of the estate to the hospitals, thereby upsetting this balance.¹⁷¹ The South Carolina Supreme Court held that this result would frustrate the testator's eleemosynary intent.¹⁷² To avoid this outcome, the court applied dependent relative revocation.¹⁷³ Accordingly, when the museum provisions failed due to a mistake of fact, "the Library provisions [were] automatically reinstated to prevent the frustration of the intent of the testatrix."¹⁷⁴

California applied the doctrine of dependent relative revocation in *In re Kaufman's Estate*.¹⁷⁵ The case involved a testator who executed a California will identical to a will he had earlier executed in New York, except for a change in executor.¹⁷⁶ When his California will was not accepted for probate,¹⁷⁷ Justice Traynor applied the doctrine of dependent relative revocation to probate the testator's New York will.¹⁷⁸ Justice Traynor first noted that "[t]he doctrine [of dependent relative revocation] is designed to carry out the probable intention of the testator when there is no reason to suppose that he intended to revoke his earlier will if the later will became inoperative."¹⁷⁹ After examining the facts of the case with respect to the doctrine, Justice Traynor held that "[s]ince the second will was virtually identical with the first in the disposition of the testator's estate, it is clear that the first will was revoked only because the second duplicated its purpose and that the testator would have preferred the first will to intestacy

170. *Id.*

171. *Id.*

172. *Id.* The court reached this conclusion even though the beneficiaries in the conflicting documents were completely different. *Id.* at 624-25.

173. *Id.* at 628.

174. *Id.* The court went on to say that "even if the mistake be considered one of law this would have no effect on the rule." *Id.*

175. 155 P.2d 831 (Cal. 1945).

176. *Id.* at 832 (noting that "[b]oth wills named identical persons for identical cash bequests and the Second Church of Christ, Scientist, of New York City, as residuary legatee"). Kaufman changed executors because the executor on his New York will, Mr. Franklin, was "a busy man" who "would not want to come" to California to take care of Kaufman's estate. *Id.*

177. Because Kaufman died within 30 days of executing his California will, the new will was ineffective under California statutory law. *Id.* at 833.

178. *Id.* at 834.

179. *Id.* at 833.

...¹⁸⁰ Thus, revocation of the old will was found to be inseparably related to the effectiveness of the new will.¹⁸¹ As such, Justice Traynor held that revocation of the old will did not occur and ordered that the old will be admitted to probate.¹⁸²

3. *The Court's Reasoning.*—In *Kroll v. Nehmer*, the Court of Appeals held that the doctrine of dependent relative revocation was erroneously applied by the lower courts, and that such application was inconsistent with the testator's intentions.¹⁸³ In reaching this holding, the court began its analysis by noting that the doctrine can be applied in two cases: where the testator's *mistake of fact* causes her to revoke her will,¹⁸⁴ and where the testator's *mistake of law* impresses a false belief that the subsequently executed will is valid.¹⁸⁵ *Kroll* represents a mistake of law situation,¹⁸⁶ since the orphans' court found that Binco intentionally revoked her will under the mistaken assumption that her later will would be valid.¹⁸⁷

The Court of Appeals perceived the dispositive question as what the testator would have preferred had she known her new will was invalid.¹⁸⁸ To answer this question, the court noted some of the factors generally considered in deciding whether to apply dependent relative revocation: any parol evidence that casts light on the intent of the testator, how the testator revoked the existing will, whether a new will was written, the temporal connection between the old and new will, and any similarities and differences between the old and any new wills.¹⁸⁹ Often, because much of the above evidence simply does not exist or is not helpful, "courts . . . refuse[] to apply the doctrine unless the [old and new wills] reflect a common dispositive scheme."¹⁹⁰

180. *Id.* at 834.

181. *Id.*

182. *Id.*

183. *Kroll*, 348 Md. at 631-32, 705 A.2d at 723.

184. *Id.* at 619, 705 A.2d at 717. Such a mistake in fact occurs when a testator mistakenly destroys his will without realizing that it was, in fact, his will he was destroying. Warren, *supra* note 2, at 338; see also 2 BOWE & DOUGLAS, *supra* note 2, § 21.57, at 446.

185. *Kroll*, 348 Md. at 619-20, 705 A.2d at 717-18. Mistake-of-law situations arise "where the mistake is not in the revocation itself but in the inducement for the act, arising from facts or circumstances extrinsic to the instrument revoked." *Id.*, 705 A.2d at 717; see also 2 BOWE & DOUGLAS, *supra* note 2, § 21.57, at 446.

186. *Kroll*, 348 Md. at 624, 705 A.2d at 720.

187. *Id.* at 618, 705 A.2d at 717.

188. *Id.* at 629, 705 A.2d at 722 ("The real question is what Ms. Binco would have wanted to do if she had been told that she was unable to make a new will . . .").

189. *Id.* at 629-30, 705 A.2d at 722.

190. *Id.* at 630, 705 A.2d at 722-23.

Turning to the facts in *Kroll*, the Court of Appeals first looked for evidence that Binco intended her revocation of the 1985 will to be conditional on the validity of the 1990 will.¹⁹¹ They found that Binco's unambiguous language written on the 1985 will,¹⁹² in combination with her new handwritten will created at the time of revocation of the 1985 will, "indicat[ed] with some clarity that her act of revocation was based on her mistaken belief that the new will was valid and would replace the old one."¹⁹³ However, the court noted that this mistake regarding the new will "does not alone justify application of the doctrine of dependent relative revocation."¹⁹⁴

Rather, the court had to locate "that fictional presumed intent of what [Binco] would have done had she been informed that she could not make a new will."¹⁹⁵ The evidence regarding the relationship between the appellant and the testator was conflicting and of little assistance to the court.¹⁹⁶ However, a comparison of the legatees listed for the 1985 and 1990 wills did aid the court in its analysis, as the two wills listed almost completely different beneficiaries.¹⁹⁷ In fact, with one possible exception, "none of the beneficiaries under the 1985 will were named in the 1990 will."¹⁹⁸ Therefore, "the effect of applying the doctrine [of dependent relative revocation] and disregarding [Binco's] revocation . . . is precisely to do what she clearly did not want done—to leave her estate to people she had intended to disinherit."¹⁹⁹ Accordingly, the court held that it could not apply the doctrine of relative revocation, and instead remanded the case to the lower court to proceed with intestacy.²⁰⁰ The court did clarify, however, that its holding applied to the facts of *Kroll*, and that no broader

191. *Id.* at 631, 705 A.2d at 723.

192. *See supra* note 16 and accompanying text (explaining that upon Binco's drafting the 1990 will, she hand wrote "VOID—NEW WILL DRAWN UP 6-28-90" on the back of the 1985 will).

193. *Kroll*, 348 Md. at 631, 705 A.2d at 723.

194. *Id.*

195. *Id.*; *see also supra* notes 40-43 (discussing why presumed intent under dependent relative revocation has been dubbed a "fiction").

196. *Kroll*, 348 Md. at 631, 705 A.2d at 723. The court noted that while some evidence indicated that Binco did not have a good relationship with her brother (Henry Kroll) and would not have desired that he take any part of her estate, other testimony contradicted this evidence, suggesting that Binco and Kroll did have a cordial relationship. *Id.*

197. *Id.*

198. *Id.* ("The 1990 will replaced them all, indicating that Ms. Binco did not wish any of them . . . to be benefitted.")

199. *Id.*

200. *Id.*

lesson about the state of the doctrine in Maryland should be gleaned from the case.²⁰¹

4. *Analysis.*—In *Kroll v. Nehmer*, the Court of Appeals refused to apply the doctrine of relative revocation in a case in which the differences in dispositive schemes between the testator's wills clearly indicated her intent.²⁰² In so ruling, the court followed both Maryland precedent²⁰³ and a general trend among states in refusing to apply the doctrine of dependent relative revocation in a situation where it is not clear that the testator would have preferred the dispositive scheme of a prior will to intestacy.²⁰⁴

a. *The Kroll Decision.*—The *Kroll* decision was consistent with the public policy underlying both Maryland statutory law requiring certain will formalities and prior case law holding that courts

201. See *id.* ("We need not decide in this case whether the doctrine of dependent relative revocation . . . is part of Maryland law . . .").

202. *Id.* at 631-32, 705 A.2d at 723.

203. See *id.* at 630, 705 A.2d at 722-23 ("In many cases, because the other evidence is either inconclusive or nonexistent, the principal focus is on the differences and similarities between the two instruments. In that regard, courts have generally refused to apply the doctrine unless the two instruments reflect a common dispositive scheme." (citations omitted)).

204. See *In re Kaufman's Estate*, 155 P.2d 831, 834 (Cal. 1945) ("Since the second will was virtually identical with the first in the disposition of the testator's estate, it is clear that the first will was revoked only because the second duplicated its purpose and that the testator would have preferred the first will to intestacy as to a substantial part of his estate."); *Churchill v. Alessio*, 719 A.2d 913, 918 (Conn. App. Ct. 1998) (noting that under dependent relative revocation, "[t]he revival of the old will is the result of the legal presumption that a testator would prefer an old, previously revoked will to intestacy"); *In re Nutting's Estate*, 82 F. Supp. 689, 690 (D.D.C. 1949) (noting, in applying the doctrine of dependent relative revocation, that "[c]ertainly [the testator] preferred the [earlier] will to intestacy as to a substantial part of her estate"); *In re Jones*, 352 So. 2d 1182, 1186 (Fla. Dist. Ct. App. 1977) (finding dependent relative revocation applicable in part because it was clear that the testator "did not intend to die intestate"); *In re McKay's Estate*, 79 N.W.2d 597, 600 (Mich. 1956) (noting that the testator's "intention implements the presumption against intestacy which is the foundation of the rule of dependent relative revocation"); *Estate of Lyles*, 615 So. 2d 1186, 1191 (Miss. 1993) (noting that "the heart of the doctrine . . . is the idea that, given the option, the testator . . . would prefer the will as executed over intestacy"). See generally 2 BOWE & PARKER, *supra* note 2, § 21.57, at 449-50 (noting that the larger the difference between the valid but revoked will and the most recent but invalid will, the less a court should be willing to apply the doctrine of dependent relative revocation); Palmer, *supra* note 44, at 998 ("If the testamentary disposition is closer [to the testator's intent, then] dependent relative revocation should be applied and the will held unrevoked, but if intestacy is closer the doctrine should be held inapplicable."); Warren, *supra* note 2, at 350 (advising a probate judge, faced with a testator's revocation based on a mistake in fact, to "[d]ecline to tamper with [a testator's] revocation at all, if you please; but if you do tamper with it, set it aside only if that would meet the probable intention of the testator were it possible to call the error to his notice").

should not supersede a testator's intentions. Courts, including those in Maryland, agree that in cases where the old, valid (but revoked) will is very similar in disposition to the new, invalid (but unrevoked) will, the doctrine of dependent relative revocation may be allowed to resuscitate the old will.²⁰⁵ Application of the doctrine often turns on whether the revocation and the making of a new will were part of one scheme.²⁰⁶ However, courts often interpret a complete change in one's testamentary dispositions as an indication that the testator meant her revocation to be permanent, regardless of whether the later will stands.²⁰⁷

Similarly, courts refuse to presume a testator's intentions by creating a will in situations where a testator canceled a will saying she would write a new one, but never did so.²⁰⁸ The *Kroll* decision was

205. See *Kroll*, 348 Md. at 630, 705 A.2d at 722-23; see also *Kaufman*, 155 P.2d at 834 (holding that the similarity between Kaufman's old, revoked will and his new, invalid will made dependent relative revocation appropriate); *Arrowsmith v. Mercantile-Safe Deposit*, 313 Md. 334, 351, 545 A.2d 674, 683 (1988) (noting the importance of similarity in disposition between an old revoked and a new invalid will when deciding whether to apply dependent relative revocation).

206. See *Kaufman*, 155 P.2d at 834 ("When a testator repeats the same dispositive plan in a new will, revocation of the old one by the new is deemed inseparably related to and dependent upon the legal effectiveness of the new."); see also *McIntyre v. McIntyre*, 47 S.E. 501, 503 (Ga. 1904) (noting the importance of similarity between new and old testamentary disposition); *Arrowsmith*, 313 Md. at 347, 545 A.2d at 680-81 (noting that identical dispositive plans between new and old wills are evidence that the two were part of one scheme). As the Court of Appeals stated in 1912:

If it is clear that the cancellation and the making of a new will were parts of one scheme, and the revocation of the old will was so related to the making of the new as to be dependent upon it, then if the new will be not made, or if made, is invalid, the old will, though cancelled, should be given effect, if its contents can be ascertained in any legal way.

Safe Deposit & Trust Co. v. Thom, 117 Md. 154, 168, 83 A. 45, 50 (1912).

207. See *Kroll*, 348 Md. at 631, 705 A.2d at 723; see also *Wallingford's Ex'r v. Wallingford's Adm'r*, 99 S.W.2d 729, 731 (Ky. 1936) (finding the doctrine not applicable, and noting that "[n]ot only does the new will in express terms indicate a positive intention to revoke the old one, but, in making an entirely different disposition of the testator's estate, no room is left for the presumption or inference that the revocation was intended to depend upon whether the later will or any provisions thereof would be efficacious"); *Watson v. Landvatter*, 517 S.W.2d 117, 122 (Mo. 1974) (refusing to apply the doctrine, and noting that "the doctrine has been held inapplicable in a case in which the new will was materially different from the old one"); *In re Guardianship & Conservatorship of Estate of Tennant*, 714 P.2d 122, 129-30 (Mont. 1986) (noting that "an essential element of [dependent relative revocation] is that the new will and the old will of the testator must reflect essentially the same dispositive plan"); *Chambers v. Chambers*, 542 S.W.2d 901, 906 (Tex. Civ. App. 1976, no writ) (concluding that "the doctrine does not apply" owing to the "extremely different manner" in which the two instruments in question indicated the testator's intent to dispose of his property).

208. See *Arrowsmith*, 313 Md. at 350, 545 A.2d at 682 (declaring that "this Court is neither empowered to write a will for [the deceased testator] nor structure a will that differs from

consistent with prior Maryland case law and statute by refusing to apply the doctrine of dependent relative revocation to Binco's 1990 will. The court's choice was between intestacy, benefitting heirs not mentioned in any will, and a will with legatees to whom it *knew* the testator did not want to bequeath.²⁰⁹ Because the legislature established the intestacy statutes as a "best guess" of how a typical intestate citizen would want her estate to be dispersed, the court was correct to choose the will beneficiary from this "best guess" over beneficiaries that the testator clearly rejected.

One consequence of the *Kroll* court's properly narrow holding is that it fails to offer guidance to future courts regarding when to apply the doctrine of dependent relative revocation. As noted above, courts tend to apply the doctrine when the wills are almost identical,²¹⁰ and decline to apply the doctrine when the testator's intentions are clearly contradictory to the earlier will.²¹¹ Yet no court, including *Kroll*, has answered the question of how to handle cases in the middle; how similar must a revoked will be to a later flawed will before the court will allow dependent relative revocation to operate.

For example, suppose *T*'s valid will, VW, was written in 1990 and has as beneficiaries *P*, *Q* and *R*. *T*'s invalid will, IW, was written in 1995 and has as beneficiaries *P*, *Y* and *Z*. Her intestacy beneficiaries are *A*, *B* and *C*. Clearly, *T* wanted *P* to benefit under both wills. It is equally clear that she did not want *A*, *B*, and *C* to benefit under either of her testate plans. Following the *Kroll* court's logic, a court would focus principally on the "differences and similarities" between wills VW and IW.²¹² A court in this situation would likely apply dependent relative revocation if *T*'s bequest to *P* in both wills was 99% of her estate. But what if the bequests under both wills were one-third of her estate equally to each beneficiary? The greater the difference between wills VW and IW, the more difficult the decision whether to apply dependent relative revocation. This is because as the differences increase between wills VW and IW, it becomes more difficult for

any will which [the deceased testator] ever executed"); *Semmes v. Semmes*, 7 H. & J. 388, 391 (Md. 1826) (noting that although the testator "did not intend to die intestate, . . . we cannot make a will for him").

209. *Kroll*, 348 Md. at 621-22, 705 A.2d at 718-19 (referring to Ms. Binco's 1985 will). If Binco had wanted the legatees named in the 1985 will to still benefit, presumably she would have provided for them in her subsequent wills. See *id.* at 631, 705 A.2d at 723 (referring to the beneficiaries not included in the 1990 and 1994 wills as those Ms. Binco "intended to disinherit").

210. See *supra* notes 205-206.

211. See *supra* notes 207-208.

212. See *Kroll*, 348 Md. at 630, 705 A.2d at 722 (noting that "in many cases . . . the principal focus is on the differences and similarities between the two instruments").

the court to answer “the real question” of what *T* “would have wanted to do if she had been told [before she died] that she was unable to make a new will: would she have preferred her estate to pass under [the VW will] to persons she had decided to remove as beneficiaries, or would she have preferred that her estate pass intestate?”²¹³ While the *Kroll* court hinted that a court should consider “all of the relevant circumstances surrounding the revocation,”²¹⁴ it did not take the opportunity to say how it would weigh the different evidence, or how much proof would be required for the doctrine to apply.²¹⁵

b. An Alternative to Dependent Relative Revocation.—Although the *Kroll* decision followed prior Maryland court rulings on the doctrine of dependent relative revocation, its discussion of this doctrine exposed a conflict in testamentary law: the struggle between maintaining will formalities and carrying out the desire of the testator. There is an answer to this dilemma that would allow both sides of this conflict to win: a harmless error rule.

The thrust behind the adoption of a harmless error rule would be an understanding “that the law could avoid so much of the hardship associated with the rule of strict compliance if the presumption of invalidity now applied to defectively executed wills were reduced from a conclusive to a rebuttable one.”²¹⁶ This rule could be applied either judicially, through a substantial compliance doctrine, or legislatively, through a statutory dispensing power.²¹⁷

(1) *Substantial Compliance.*—Under a substantial compliance doctrine, the court would allow slightly defective²¹⁸—and therefore technically invalid—wills to pass through probate, so long as it satisfied the purposes behind statutory will formalities.²¹⁹ Such an ap-

213. *Id.* at 629, 705 A.2d at 722.

214. *Id.*; see *supra* text accompanying note 189 (describing the types of factors at which the court would look).

215. *Kroll*, 348 Md. at 629-30, 705 A.2d at 722-23.

216. Langbein, *Excusing Harmless Errors*, *supra* note 52, at 4.

217. *Id.* at 6.

218. Consider, for example, *In re Kaufman's Estate*, 155 P.2d 831 (Cal. 1945), involving old and new wills that were virtually identical. *Id.* at 832. Despite this, the court still had to work through “the highly fictional process to pretend” that the testator’s unconditional act based on the mistaken belief that his later will would be valid was really an unconditional act. *Id.* at 833-34; see also 2 BOWE & PARKER, *supra* note 2, § 21.57, at 446. This is how the court was able to probate Kaufman’s old will. *Kaufman*, 155 P.2d at 834. Under a substantial compliance doctrine, the court would have arrived at approximately the same outcome; it just would have arrived there by finding that the testator’s new will substantially complied with the statute, and allowed that will to go to probate.

219. See *supra* Part 2.b (discussing the purposes of will formalities).

proach would be similar to that found in dependent relative revocation cases. When a court applies dependent relative revocation, it seems to really be saying "it is not equitable to allow this person's estate to pass through intestacy, given what we know of her true intentions from her invalid will."²²⁰ By following a doctrine of substantial compliance, the court would be doing what it really wanted to do—allow the defective will to be probated, without having to create the fiction of a "conditional revocation" as required under the doctrine of dependent relative revocation.²²¹

Substantial compliance would allow a court to avoid the cumbersome artificially-produced "conditional revocation" in dependent relative revocation²²² while giving greater effect to the testator's true desires. The substantial compliance doctrine does this by framing the situation as it really is: a testator who meant to create a will, but failed to meet a minor statutory requirement, is deemed to have crafted a probate-worthy will because her document substantially complied with the statutory requirements. Substantial compliance serves the same purpose as dependent relative revocation, and achieves the result most consistent with the testator's wishes, but without the doctrinal mess.

With dependent relative revocation's conditional revocation, on the other hand, a court frames the testator's revocation as having been conditioned on facts that the testator believed to be true at the time (the mistaken belief that the later will would pass probate), when in reality, the testator made an unconditional revocation coupled with a mistake of law.²²³ The artificiality, or fiction, is that a court transforms a testator's unconditional action into a conditional one.

Despite the potential of the substantial compliance doctrine as a tool for Maryland courts to better effectuate a testator's intent, the prior examples using *Kaufman* and *Kroll* expose a problem with this proposed doctrine: overcoming explicit statutory language. For example, section 4-102 of the Maryland Estates & Trust Code establishes specific requirements regarding the signing and attestation of a

220. See *Kaufman*, 155 P.2d at 834 (noting that "[s]ince [Kaufman's] second will was virtually identical with the first in the disposition of the testator's estate, it is clear that the first will was revoked only because the second duplicated its purpose and that the testator would have preferred the first will to intestacy as to a substantial part of his estate").

221. See 2 BOWE & PARKER, *supra* note 2, § 21.57, at 446 (describing the artificial condition set up by courts in dependent relative revocation cases).

222. See *supra* note 221.

223. See Warren, *supra* note 2, at 342 (noting that in these situations, "there is no question that the testator intends to revoke his will. . . . [h]e is, however, induced to do so by a misapprehension of law or of fact").

will.²²⁴ Great judicial activism would be required to probate a will that, while clearly failing to meet these statutory requirements, fulfilled the legislature's intent. Further, the Maryland courts would have to overrule longstanding precedent.²²⁵ For these reasons, the legislature seems a more likely source of a harmless error rule.

(2) *Statutory Dispensing Power.*—The Wills Act, obviously, was enacted by the legislature; creation of a statutory dispensing power could occur by a legislative act.

In South Australia, the state parliament adopted just such a statute. It reads:

A document purporting to embody the testamentary intentions of a deceased person shall, notwithstanding that it has not been executed with the formalities required by this Act, be deemed to be a will of the deceased person if the [probate court], upon application for admission of the document to probate as the last will of the deceased, is satisfied that there can be no reasonable doubt that the deceased intended the document to constitute his will.²²⁶

By adopting a similar statute, the Maryland legislature would resolve the conflict experienced by Maryland courts, and allow them to fully implement the intent of testators. At the same time, such a statute would render unnecessary the doctrine of dependent relative revocation and its fictitious artificial conditional revocation.

5. *Conclusion.*—The *Kroll* court's holding—that the doctrine of dependent relative revocation is inapplicable when there is a great difference in dispositive schemes between an old valid will and the new will that revoked it—is consistent with previous analysis of the doctrine in Maryland. It also follows the tendency of many states to only use this doctrine to correct minor testamentary errors. Although the court did not elaborate on the circumstances under which the doctrine of dependent relative revocation might be applied in Maryland, its holding implies a willingness by the court to continue interpreting the testamentary statutes strictly.

The court's ruling highlights an ongoing conflict within testamentary law between adherence to will formalities and fulfilling the

224. See *supra* note 67 (stating the text of this statute).

225. See *supra* Part 2.e (discussing the history of the doctrine of dependent relative revocation in Maryland).

226. Langbein, *Excusing Harmless Errors*, *supra* note 52, at 9 (citing the Wills Act Amendment Act (No. 2) of 1975, § 9).

intent of a testator. It should prompt examination of how testamentary statutes are currently applied, and analysis of whether this application is really in the best interest of society.

JONATHAN M. HOLDA

VII. EVIDENCE

A. *The Tacit Admission Rule Misapplied*

In *Key-El v. State*,¹ the Court of Appeals considered whether an accused's silence in the face of an accusation made against him in the presence of a police officer could constitute a tacit admission.² The court held that admission of the accused's pre-arrest silence as substantive evidence against him was valid on both evidentiary and constitutional grounds.³ The court rejected the notion that such pre-arrest silence is inadmissible because it is ambiguous in light of the Fifth Amendment right to remain silent,⁴ and reasoned that the circumstances surrounding pre-arrest silence should be examined by the trial court on a case by case basis before determining the question of admissibility.⁵ The court also concluded that the admission of pre-arrest silence in the presence of a police officer did not automatically burden the defendant's Fifth Amendment privilege against self-incrimination.⁶ In validating the prosecution's use of Key-El's pre-arrest silence, the court correctly identified the threshold requirements established by Maryland case law for determining the admissibility of tacit admissions.⁷ However, in deciding that such admissions by silence may be

1. 349 Md. 811, 709 A.2d 1305, *cert. denied*, 119 S. Ct. 267 (1998).

2. *Id.* at 813, 709 A.2d at 1305. The tacit admission exception to the hearsay rule is codified in the Maryland Rules of Evidence. See MD. RULE 5-803(a)(2) (specifying that "[a] statement of which the party has manifested an adoption or belief in its truth" is not excluded by the hearsay rule). The tacit admission exception had long been recognized as part of Maryland's common law, and the rule is a codification of that common law. *Key-El*, 349 Md. at 816, 709 A.2d at 1307. The Court of Appeals has explained that "[a] tacit admission occurs when one remains silent in the face of accusations that, if untrue, would naturally rouse the accused to speak in his or her defense." *Henry v. State*, 324 Md. 204, 241, 596 A.2d 1024, 1043 (1991) (quoting *Briggeman v. Albert*, 322 Md. 133, 137-38, 586 A.2d 15, 17 (1991)). The *Henry* court noted several prerequisites to classifying silence as a tacit admission:

In order for the other's statement to be considered the party's tacit admission, the following prerequisites must be satisfied: (1) the party heard and understood the other person's statement; (2) at the time, the party had an opportunity to respond; (3) under the circumstances, a reasonable person in the party's position, who disagreed with the statement, would have voiced that disagreement. The party must have had first-hand knowledge of the matter addressed in the statement.

Id. at 241-42, 596 A.2d at 1043 (quoting 6 LYNN McLAIN, MARYLAND PRACTICE: MARYLAND EVIDENCE STATE AND FEDERAL § 801(4).3, at 312-13 (1987)); see also *infra* notes 116-117 and accompanying text.

3. *Key-El*, 349 Md. at 820, 824, 709 A.2d at 1309, 1311.

4. The Fifth Amendment provides: "No person shall . . . be compelled in any criminal case to be a witness against himself . . ." U.S. CONST. amend. V.

5. *Key-El*, 349 Md. at 818-19, 709 A.2d at 1308.

6. *Id.* at 824, 709 A.2d at 1311.

7. See *supra* note 2.

used as substantive evidence of guilt rather than as impeachment evidence only, the court failed to recognize that the Fifth Amendment is necessarily implicated in pre-arrest situations, and therefore did not adequately safeguard the defendant's constitutional rights under the Fifth Amendment.

1. *The Case.*—On the night of August 19, 1994, Baltimore County Police Officer John Johnson arrived at the home of Philip Key-El and his wife, Pamela to investigate a 911 call recently placed from the home.⁸ When Mr. Key-El answered Officer Johnson's knock at the door, Officer Johnson asked him whether anyone had placed a 911 call, and whether there was any trouble.⁹ Mr. Key-El responded "no," but his wife, who was in the next room, responded "yes," at which point Officer Johnson entered the house.¹⁰ With Mr. Key-El standing nearby, Officer Johnson asked Mrs. Key-El what happened.¹¹ Officer Johnson testified that Mr. Key-El was three or four feet away when his wife made the accusation.¹² Mrs. Key-El responded that she had gotten into an argument with her husband and that he pulled her hair and punched her in the face.¹³ Mr. Key-El made no response to his wife's accusation.¹⁴ Officer Johnson later placed Mr. Key-El under arrest.¹⁵

At Mr. Key-El's battery trial in the Circuit Court for Baltimore County, Mrs. Key-El denied her previous allegations and testified in her husband's defense, claiming that it was actually another woman who struck her.¹⁶ Mrs. Key-El testified that when she came home the night of August 19, 1994, she found her husband with another woman.¹⁷ She claimed that she and the other woman argued and exchanged blows before Mr. Key-El was able to get the woman out of the house.¹⁸ Mrs. Key-El testified further that she and her husband continued to argue, and that she called the police and accused Mr. Key-El of battering her after he refused to identify the other woman and explain what she was doing in their home.¹⁹ Mrs. Key-El testified that

8. *Key-El*, 349 Md. at 813, 709 A.2d at 1305.

9. *Id.*

10. *Id.*

11. *Id.*, 709 A.2d at 1305-06.

12. *Id.* at 815, 709 A.2d at 1306.

13. *Id.*

14. *Id.* at 814, 709 A.2d at 1306.

15. *Id.*

16. *Id.*

17. *Id.*

18. *Id.*

19. *Id.*

she falsely accused her husband because she wanted to hurt him “the way that he hurt me.”²⁰ On cross-examination, however, Mrs. Key-El testified that she had sent a letter to the State’s Attorney’s office repeating the battery accusation against her husband in response to a request that she complete a victim impact statement.²¹ Mrs. Key-El testified that when her husband saw the letter from the State’s Attorney’s Office requesting that his wife complete the victim statement, he became angry and threw it away.²²

Officer Johnson was recalled by the State as a rebuttal witness, and he testified that Mr. Key-El remained silent in the face of his wife’s accusation on the night of August 19, 1994.²³ Officer Johnson’s testimony was admitted in evidence over the objections of the defense.²⁴ The jury found Mr. Key-El guilty of battery and sentenced him to five years imprisonment.²⁵

On appeal, the Court of Special Appeals considered, *inter alia*, whether the trial court erred in admitting evidence of Mr. Key-El’s pre-arrest silence when Mrs. Key-El’s accusations were made in the presence of a police officer.²⁶ The court acknowledged that other jurisdictions have rejected the tacit admission rule when the accusation occurs in the presence of a police officer on the rationale that silence in such a situation “is so ambiguous as to be of little probative [value].”²⁷ However, the court stated that the admission by silence exception to the hearsay rule has been recognized by Maryland law,²⁸ and observed that “[n]o Maryland Court has held that the mere presence of the police is sufficient to preclude testimony of an accused’s silence under circumstances where a response might reasonably be expected.”²⁹ In determining that Mr. Key-El’s silence was probative of the truth of Mrs. Key-El’s trial testimony, the court stated that “[i]f ever there was an opportunity to express righteous indignation for

20. *Id.*

21. *Id.*

22. *Id.*

23. *Id.* at 814-15, 709 A.2d at 1306. Officer Johnson testified that when Mrs. Key-El told him that her husband had struck her, Mr. Key-El was standing in the dining room, approximately four feet away from him. Officer Johnson also testified that Mrs. Key-El spoke loudly enough for Mr. Key-El to hear, and that when she stated that her husband hit her, Mr. Key-El said nothing. *Id.*

24. *Id.* at 815, 709 A.2d at 1306.

25. *Id.*

26. Key-El v. State, No. 65, slip op. at 2 (Md. Ct. Spec. App. Nov. 22, 1996), *aff’d*, 349 Md. 811, 709 A.2d 1305, *cert. denied*, 119 S. Ct. 267 (1998).

27. *Id.* at 5.

28. *Id.* (citing Ewell v. State, 228 Md. 615, 618-19, 180 A.2d 857, 859-60 (1962); Duncan v. State, 64 Md. App. 45, 50-51, 494 A.2d 235, 237 (1985)).

29. *Id.* at 6.

being falsely accused of a crime, it was when [Mrs. Key-El] accused appellant of an assault that, if she is to be believed, was committed by appellant's female guest."³⁰ The court held that the trial court did not err in admitting Mr. Key-El's silence as a tacit admission, and upheld Mr. Key-El's conviction.³¹ The Court of Appeals granted certiorari to consider whether the trial court properly admitted rebuttal evidence regarding Mr. Key-El's pre-arrest admission by silence when his wife, in the presence of a police officer, accused him of battering her.³²

2. *Legal Background.*—The tacit admission rule is codified at Maryland Rule 5-803(a)(2), which states, "a statement of which the party has manifested an adoption or belief in its truth" is not excluded by the hearsay rule.³³ Prior to its codification, the tacit admission rule was long a part of Maryland common law.³⁴ While recognizing the

30. *Id.*

31. *Id.* Judge Wilner concurred in the result, noting that the Court of Special Appeals was bound by the Court of Appeals's decision in *Barber v. State*, 191 Md. 555, 62 A.2d 616 (1948), in which an accusation made in the presence of law enforcement officers was admissible as a tacit admission. *Key-El v. State*, No. 65, concurring slip op. at 1 (Md. Ct. Spec. App. Nov. 22, 1996) (Wilner, J., concurring). Judge Wilner stated that if it were not for the *Barber* decision, he would have dissented because the widespread popular knowledge of an accused's right to remain silent renders all pre-arrest silence in the presence of a law enforcement officer ambiguous. *Id.* Judge Wilner expressed hope that the Court of Appeals would take the opportunity to reconsider *Barber*. *Id.* at 2.

32. *Key-El*, 349 Md. at 813, 709 A.2d 1305.

33. MD. RULE 5-803(a)(2). The rule has been applied when an accused fails to respond in the face of an accusatory statement, as in *Key-El*. See *Ewell*, 228 Md. at 617, 180 A.2d at 859; *Duncan*, 64 Md. App. at 49, 494 A.2d at 237. However, when analyzing the admissibility of an accused's silence in various pre- and post-arrest situations, Maryland courts have borrowed reasoning from Supreme Court cases in which defendants fail to proffer alibis in situations where they might reasonably be expected, rather than from cases in which defendants remain silent in response to accusatory statements. See *Key-El*, 349 Md. at 821-23, 709 A.2d at 1309-10 (discussing *Doyle v. Ohio*, 426 U.S. 610 (1976), and *Jenkins v. Anderson*, 447 U.S. 231 (1980)); *Wills v. State*, 82 Md. App. 669, 672-73, 573 A.2d 80, 82 (1990) (same). From an analytical perspective, therefore, Maryland courts have not distinguished silence maintained in response to a statement from silence maintained in a situation where an alibi or explanation would be expected.

34. See, e.g., *Kelly v. State*, 151 Md. 87, 96-97, 133 A. 899, 902-03 (1926) (holding acquiescence by a young man in the presence of actions implicating him as the father of an illegitimate child was admissible as a "vicarious admission by him of the truth of the charge"). In *Zink v. Zink*, 215 Md. 197, 137 A.2d 139 (1957), the Court of Appeals explained the basis for the rule as follows:

Where a party to an action adopts a statement uttered by another, it becomes his own admission. In some situations standing mute may constitute the adoption of the statement of another person. This can be only when no other explanation is equally consistent with silence—i.e., if the situation and circumstances are such that a dissent in ordinary experience would have been expressed if the statement or communication had not been correct.

validity of tacit admissions, the Maryland courts were circumspect with regard to the evidentiary value of such admissions. Therefore, at common law, tacit admissions were admissible only as circumstantial evidence of the truth of an accusatory statement.³⁵

a. Admissibility of Silence Maintained in the Presence of Police Officers Before Miranda.—Silence maintained in the presence of law enforcement officers has been subject to greater judicial scrutiny than silence maintained when an officer is not present. In *Barber v. State*,³⁶ the Court of Appeals considered whether a defendant's refusal to speak post-arrest in response to an accusatory statement made by a co-defendant while in the presence of law enforcement officers could constitute a tacit admission.³⁷

Barber and a co-defendant, Holmes, were arrested in connection with a robbery.³⁸ Holmes made a statement to the police implicating Barber in the crime, and then lead the police to a creek where the clothes worn by the men during the robbery were hidden.³⁹ The police later brought both Barber and Holmes back to the creek, where they asked Barber if a pair of trousers in the pile of clothes belonged to him.⁴⁰ Barber responded, "I have nothing to say."⁴¹ The police then asked Holmes whose trousers they were, and he replied "Barber's."⁴²

While recognizing that silence maintained by a suspect in response to an accusatory statement is inadmissible in some states when the suspect is under arrest,⁴³ the court chose to follow other states and view the arrest as merely one of the circumstances to be considered in

Id. at 202, 137 A.2d at 142 (citing 4 JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW §§ 1069, 1071 (3d ed.)).

35. See *Ewell*, 228 Md. at 619, 180 A.2d at 860 (noting that if testimony of a tacit admission is allowed into evidence, the trial judge should inform the jury that "such evidence is to be received with caution, that it is not substantive evidence of the fact asserted and does not of itself show guilt and that it is but a circumstance which permits the drawing of an inference of guilt"); *Ellison v. State*, 56 Md. App. 567, 582, 468 A.2d 413, 420 (1983) ("The error found . . . involved a failure to instruct the jury that a failure to deny [an accusatory statement] only gives rise to an inference and is not direct evidence.").

36. 191 Md. 555, 62 A.2d 616 (1948).

37. *Id.* at 564-65, 62 A.2d at 620.

38. *Id.* at 560-61, 62 A.2d at 618.

39. *Id.* at 562, 62 A.2d at 619.

40. *Id.*

41. *Id.*

42. *Id.*

43. *Id.* at 565, 62 A.2d at 620 (citing *People v. Rutigliano*, 184 N.E. 689 (N.Y. 1933); *People v. Mleczko*, 81 N.E. 65 (N.Y. 1948); *State v. Battle*, 212 S.W.2d 753 (Mo. 1948)).

determining admissibility.⁴⁴ Adopting the latter approach, the court observed that “the better rule is to allow some flexibility according to circumstances.”⁴⁵

Having adopted a case by case approach to determining the admissibility of post-arrest silence in the presence of law enforcement officers, the court determined that the trial court erred in admitting the officer’s testimony concerning Barber’s silence.⁴⁶ The court stated:

[E]ven in States where the fact of arrest is not controlling, if it appears that the failure to deny is attributable to fear, the advice of counsel, or the desire to exercise an assumed or asserted right against self-incrimination, it has been held that no inference of guilt can properly be drawn.⁴⁷

The court concluded that Barber’s silence “would not support an inference of admission of guilt under the circumstances” because he was told by the police and his lawyer that he had a right to decline to make a statement.⁴⁸ While the court refused to hold all post-arrest silence in the face of accusatory statements inadmissible as a tacit admission, it did recognize that an accused’s assertion of his right against self-incrimination would render the silence devoid of evidentiary value, and therefore inadmissible.⁴⁹

As the United States Supreme Court undertook to safeguard the defendant’s right against self-incrimination under the Fifth Amendment in *Miranda v. Arizona*⁵⁰ and its progeny, this affected the Maryland courts’ views on the admissibility of an accused’s silence in the presence of law enforcement officers.⁵¹ In *Miranda*, the Supreme Court established procedural safeguards that must be followed by law enforcement officers whenever an accused is subjected to “custodial interrogation,”⁵² which the Court defined as “questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way.”⁵³

44. *Id.*

45. *Id.*

46. *Id.* at 565-66, 62 A.2d at 620-21.

47. *Id.* at 565, 62 A.2d at 620 (citing *People v. Simmons*, 172 P.2d 18 (Cal. 1946)).

48. *Id.* at 566, 62 A.2d at 621.

49. *Id.* at 565, 62 A.2d at 620; *accord* *Miller v. State*, 231 Md. 215, 217-19, 189 A.2d 635, 635-37 (1963) (holding that a defendant’s silence in response to an accusatory statement when he is in police custody is inadmissible because of the defendant’s right to remain silent).

50. 384 U.S. 436 (1966).

51. *See infra* notes 57-97.

52. *Miranda*, 384 U.S. at 444.

53. *Id.*

The Court imposed an affirmative duty on law enforcement officers to notify an individual subject to custodial interrogation of his right against self-incrimination.⁵⁴ The Court believed that police interrogation was inherently coercive⁵⁵ and required the warnings as a prophylactic means of insuring against the abuse of an accused's Fifth Amendment right to remain silent.⁵⁶

b. Admissibility of Silence Maintained in the Presence of Police Officers After Miranda.—The *Miranda* decision raised new questions concerning the admissibility of silence maintained by accuseds while in the presence of police officers. The validity of the tacit admission rule as applied in pre- and post-arrest situations was thrown into question, and the Supreme Court and the Maryland courts undertook to reconcile *Miranda* and the tacit admission rule.

(1) *Admissibility of Post-Arrest, Post-Miranda Warning Silence.*—The Court of Appeals of Maryland first considered the effect of *Miranda* on the admissibility of post-arrest, post-*Miranda* warning silence in *Younie v. State*.⁵⁷ That case involved the appeal of a conviction for first degree murder and armed robbery.⁵⁸ After Younie was arrested, he was informed of his constitutional rights under *Miranda*.⁵⁹ He waived his rights, and the police subjected him to extensive questioning concerning the robbery.⁶⁰ Younie answered some of the questions, but he remained silent in response to others.⁶¹

54. *Id.* The Court required the following warnings to be given to individuals subject to custodial interrogation prior to questioning:

that he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires.

Id. at 479.

55. *Id.* at 461 ("An individual swept from familiar surroundings into police custody, surrounded by antagonistic forces, and subjected to the techniques of persuasion [employed by police] cannot be otherwise than under compulsion to speak.").

56. *Id.* at 458 ("Unless adequate protective devices are employed to dispel the compulsion inherent in custodial surroundings, no statement obtained from the defendant can truly be the product of his free choice.").

57. 272 Md. 233, 322 A.2d 211 (1974).

58. *Id.* at 235, 322 A.2d at 212.

59. *Id.*

60. *Id.* at 235-38, 322 A.2d at 212-14.

61. *Id.* at 236-37, 322 A.2d at 213.

At trial, the court allowed the transcript of the custodial interrogation to be entered in evidence as substantive evidence of guilt,⁶² and the jury found Younie guilty.⁶³ On appeal, Younie argued that his silence in response to some of the questions asked by the police "was a permissible exercise of his privilege against self-incrimination and, since the only purpose the objected to evidence served was to create the highly prejudicial inference that his failure to respond was motivated by guilt, its inclusion was reversible error."⁶⁴ The Maryland Court of Appeals agreed and overturned the conviction.⁶⁵

In reaching this conclusion, the Court of Appeals relied heavily on the *Miranda* Court's interpretation of the Fifth Amendment:

Concerned with both the inherent unreliability which may infest a coerced confession, and the unhealthy tendency which its use creates in making police and prosecutors alike less zealous in the search for independent, objective evidence, the Court in *Miranda* addressed itself specifically to the voluntariness requirement of the fifth amendment. Of particular concern to that Court was its view that custodial interrogation is inherently coercive.⁶⁶

Therefore, "'the prosecution may not use statements . . . stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination.'"⁶⁷

Rebutting the state's attempts to justify the use of Younie's silence based on the tacit admission rule,⁶⁸ the court pointed out that the assumption underlying the rule—that an innocent person would promptly deny false statements made in his presence—is generally invalid in custodial interrogation because the Constitution "permits the innocent and guilty alike to remain mute and not have this made known to the trier of facts."⁶⁹ The court held that absent clear and convincing evidence to the contrary, the courts must presume that an accused's silence in response to questions or accusations made during

62. *Id.* at 238, 322 A.2d at 214. Younie's refusal to answer some of the officer's questions was also used by the prosecution in its closing argument, and Younie's statement was given by the trial judge to the jury for use in its deliberations. *Id.*

63. *Id.* at 235, 322 A.2d at 212.

64. *Id.* at 238, 322 A.2d at 214.

65. *Id.* at 249, 322 A.2d at 219.

66. *Id.* at 240, 322 A.2d at 215 (footnote omitted).

67. *Id.* (quoting *Miranda v. Arizona*, 384 U.S. 436, 444 (1966)).

68. *Id.* at 244, 322 A.2d at 217.

69. *Id.*

custodial interrogation is an "exercise of the privilege against self-incrimination from which no legal penalty can flow."⁷⁰

The Supreme Court addressed a similar scenario in *Doyle v. Ohio*.⁷¹ While in *Younie*, the Court of Appeals relied on the Fifth Amendment in determining that post-arrest, post-*Miranda* warning silence was inadmissible as substantive evidence of guilt,⁷² the Supreme Court found such silence inadmissible for impeachment purposes on Fourteenth Amendment grounds.⁷³

In *Doyle*, the defendant was arrested and charged with selling drugs.⁷⁴ At trial, Doyle took the stand and accused the government informant of framing him.⁷⁵ On cross-examination, the prosecution asked why he had not told this story when he was initially questioned by the police after his arrest.⁷⁶ Doyle explained that he did not maintain his innocence at that time because he did not know that the informant was trying to frame him.⁷⁷

The Court held that although *Miranda* warnings contain no express assurance that silence will carry no penalty, such assurance is implicit.⁷⁸ Therefore, the Court concluded, use of post-arrest, post-*Miranda* warning silence for impeachment purposes violated the due process protections guaranteed by the Fourteenth Amendment.⁷⁹

(2) *Admissibility of Post-Arrest, Pre-Miranda Warning Silence.*—The Maryland Court of Special Appeals addressed whether post-arrest, pre-*Miranda* warning silence can be used for impeachment purposes

70. *Id.*

71. 426 U.S. 610 (1976).

72. *See supra* notes 64-70.

73. *Doyle*, 426 U.S. at 619.

74. *Id.* at 611.

75. *Id.* at 613-14. Doyle alleged that it was actually the informant who was selling the drugs, and that the deal had been disrupted when Doyle told the informant that he only wanted "one or two pounds [of marihuana] instead of the agreed-upon 10 pounds." *Id.* at 613.

76. *Id.*

77. *Id.* at 614 n.5 (quoting Transcript).

78. *Id.* at 618.

79. *Id.* at 619. The Court stated:

"An accused having the assurance of the court that his claim of privilege would be granted might well be entrapped if his assertion of the privilege could then be used against him. His real choice might then be quite different from his apparent one Elementary fairness requires that an accused should not be misled on that score."

Id. at 618 n.9 (omission in original) (quoting *Johnson v. United States*, 318 U.S. 189, 197 (1943)); *see also* *Burko v. State*, 19 Md. App. 645, 652, 313 A.2d 864, 868 (1974) (noting that allowing testimony on a defendant's choice to exercise his right to remain silent would "cloak[] the precepts of *Miranda* in an armor of gauze"), *vacated*, 422 U.S. 1003 (1975).

in *Wills v. State*.⁸⁰ Joseph Wills was convicted of selling cocaine to an undercover police officer.⁸¹ Wills appealed his conviction on the grounds that the cross-examination questions concerning his silence regarding his alibi violated the Due Process Clause of the Fourteenth Amendment, and that the evidence was inadmissible under Maryland law.⁸² In addressing the constitutional question, the Court of Special Appeals relied on the Supreme Court's decision in *Fletcher v. Weir*,⁸³ which held that the use of a defendant's post-arrest, pre-*Miranda* warning silence to impeach his credibility does not violate due process. In *Fletcher*, the Court noted that the states were entitled to determine according to their own rules of evidence whether post-arrest, pre-*Miranda* warning silence may be used against a criminal defendant.⁸⁴

Reading *Fletcher* to mean that the use of Wills's post-arrest silence did not violate the Fourteenth Amendment, the Court of Special Appeals examined whether Maryland evidentiary law precluded the use of Wills's silence by the prosecution.⁸⁵ The court noted that even before *Miranda* warnings have been administered, an accused might decide to remain silent simply because he is aware of his Fifth Amendment rights.⁸⁶ The court held that "evidence of an accused's post-arrest, pre-*Miranda* warning, silence for impeachment is inadmissible because the probative value, if any, of such evidence, is clearly outweighed by its potential for unfair prejudice."⁸⁷

(3) *Admissibility of Pre-Arrest, Pre-Miranda Warning Silence.*—*Williams v. State*⁸⁸ is the only Maryland case to address whether an accused's pre-arrest, pre-*Miranda* warning silence may be used as substantive evidence of his guilt. In *Williams*, a police officer questioned the defendant and a woman, both of whom were stopped on the

80. 82 Md. App. 669, 677, 573 A.2d 80, 84 (1990).

81. *Id.* at 670, 573 A.2d at 81.

82. *Id.* at 672, 573 A.2d at 82. The record indicated that when Wills was brought into custody, he was not read his *Miranda* rights. *Id.*

83. 455 U.S. 603 (1982) (per curiam).

84. *Id.* at 607.

85. *Wills*, 82 Md. App. at 677, 573 A.2d at 84.

86. *Id.* at 675-76, 573 A.2d at 84. Applying the test of admissibility for tacit admissions, the court noted that such an admission may be received into evidence only when "the statement and the failure to rebut it occurred in an environment and in the presence of actors such that a reply might naturally have been expected." *Id.* at 677, 573 A.2d at 84 (quoting *Ewell v. State*, 228 Md. 615, 619, 180 A.2d 857, 860 (1962)). The court opined that such an environment does not exist when a person is arrested for crime. *Id.*, 573 A.2d at 84-85.

87. *Id.* at 677, 573 A.2d at 84.

88. 4 Md. App. 342, 242 A.2d 813 (1968).

street.⁸⁹ The defendant had a bag full of clothes, and the woman was holding a skirt that had come from the bag.⁹⁰ The woman told the police officer that she was going to buy the skirt, and Williams said nothing.⁹¹ Williams was arrested for peddling without a license⁹² and was subsequently found guilty of breaking into a warehouse to steal the goods he was selling on the street.⁹³

At his trial, the defendant's silence in the face of the woman's statement that she was going to buy the skirt was held to be a tacit admission, admissible as substantive evidence of his guilt.⁹⁴ Williams argued that no inferences could be drawn from his silence because he was under no obligation to say anything when the woman made her statement.⁹⁵ Citing the tacit admission rule, and pointing out that Williams was not in custody when the statement was made,⁹⁶ the Court of Special Appeals upheld the conviction.⁹⁷

While *Williams* allowed the use of pre-arrest, pre-*Miranda* warning silence as substantive evidence of guilt, in *Jenkins v. Anderson*,⁹⁸ the Supreme Court held that use of an accused's pre-arrest silence to impeach his exculpatory testimony did not violate the Fifth or Fourteenth Amendments.⁹⁹

In *Jenkins*, the defendant stabbed and killed a man, then avoided capture by the police for two weeks before finally turning himself in.¹⁰⁰ At trial, Jenkins took the stand and testified that he killed the man in self defense.¹⁰¹ In an attempt to impeach his credibility, the prosecution questioned Jenkins as to why he never explained this story to the police before his arrest.¹⁰²

89. *Id.* at 345, 142 A.2d at 815.

90. *Id.*

91. *Id.*

92. *Id.*

93. *Id.* at 344, 142 A.2d at 814.

94. *Id.* at 348 n.6, 142 A.2d at 817 n.6.

95. *Id.*

96. *Id.*

97. *Id.* at 348 & n.6, 142 A.2d at 817 & n.6. The court offered no further explanation of its decision to admit Williams' silence as a tacit admission. However, the fact that the court noted that Williams was not in custody when the woman's accusatory statement was made suggests that the court believed the situation to be outside the purview of *Barber* and *Miranda*.

98. 447 U.S. 231 (1980).

99. *Id.* at 238-40.

100. *Id.* at 232.

101. *Id.* at 232-33.

102. *Id.* at 233.

The Court concluded that by taking the stand in his own defense, the accused "cast[] aside his cloak of silence"¹⁰³ and forfeited his Fifth Amendment right.¹⁰⁴ Moreover, there was no violation of the Fourteenth Amendment because "no governmental action induced [Jenkins] to remain silent before arrest [and] [t]he failure to speak occurred before [he] was taken into custody and given *Miranda* warnings."¹⁰⁵ While holding that use of pre-arrest silence for impeachment purposes did not violate the Constitution, the Court noted that the states were "free to formulate evidentiary rules defining the situations in which silence is viewed as more probative than prejudicial."¹⁰⁶

The Supreme Court cases following *Miranda*, as well as the Maryland cases of *Younie* and *Wills*, restricted the use of an accused's silence when in police custody or under arrest. Left unaddressed by both the Supreme Court and the Court of Appeals of Maryland, however, was the question of whether an individual's silence in the presence of a police officer prior to arrest or custody could be used as substantive evidence of guilt. The stage was thus set for the Maryland Court of Appeals to address the issue.

3. *The Court's Reasoning.*—In *Key-El v. State*, the Court of Appeals held that Key-El's pre-arrest silence, when confronted with his wife's accusation in the presence of a police officer, was admissible as a tacit admission, and that use of the tacit admission as substantive evidence of guilt did not violate his Fifth Amendment rights.¹⁰⁷ Writing for the majority, Judge Karwacki, with whom Judges Rodowsky, Chasanow, and Smith joined, began his analysis by acknowledging that Maryland has long recognized the tacit admission rule as an exception to the hearsay rule under common law.¹⁰⁸

The court explained the elements of the tacit admission rule¹⁰⁹ and then addressed the contentions of the petitioner. First, the court addressed Key-El's argument that whenever a police officer is present there should be a *per se* prohibition on the use of the pre-arrest silence of a person confronted with an accusation as tacit admission,

103. *Id.* at 238.

104. *Id.* The Court reasoned that once a defendant chooses to testify, regard for the truth finding function of the trial limits the privilege against self-incrimination. *Id.* (citing *Brown v. United States*, 356 U.S. 148, 156 (1958)).

105. *Id.* at 240.

106. *Id.*

107. *Key-El*, 349 Md. at 816, 709 A.2d at 1307.

108. *Id.*

109. *Id.* at 817, 709 A.2d at 1307 (quoting *Henry v. State*, 324 Md. 204, 241-42, 596 A.2d 1024, 1043 (1991) (quoting 6 McLAIN, *supra* note 2, § 801(4).3, at 312-13)); *see supra* note 2.

regardless of the circumstances.¹¹⁰ Key-El contended that pre-arrest silence maintained in the presence of a police officer is ambiguous at best, because of the widespread knowledge of the Fifth Amendment right to remain silent.¹¹¹

The Court of Appeals recognized that the Maryland courts, as well as the United States Supreme Court, have distinguished between pre-arrest and post-arrest silence.¹¹² While recognizing the restrictions on the use of the defendant's silence as a tacit admission after he has been arrested and read his rights, the court cited a number of cases in which tacit admissions were allowed into evidence when a law enforcement agent was present and either no arrest had been made, or an arrest had been made, but the defendant had not yet been informed of his *Miranda* rights.¹¹³ The court specifically addressed *Williams*, in which the Court of Special Appeals held that pre-arrest silence in the face of an accusation of a third party occurring in the presence of a police officer could be admitted as a tacit admission.¹¹⁴ Based on this precedent, the court determined that there was no bar to the use of tacit admissions when made in the presence of a law enforcement officer before an arrest.¹¹⁵

The court next stated the importance of determining the admissibility of tacit admissions on a case by case basis and defined the respective roles of the trial court and the jury in making this determination:

This is a text-book example of the wisdom of judging the effect of pre-arrest silence on a case by case basis. As a threshold question for the trial court, the admissibility of such silence should depend on an evaluation of the required prerequisites for the use of the tacit admission that have been established over the years by this Court, *i.e.*, did the defendant hear and understand the other party's statement,

110. Brief of Petitioner at 22-23, *Key-El v. State*, 349 Md. 811, 709 A.2d 1305 (1998) (No. 5).

111. *Id.* at 12-13.

112. *Key-El*, 349 Md. at 817-18, 709 A.2d at 1307-08 (citing *Jenkins v. Anderson*, 447 U.S. 231, 240-41 (1980); *Doyle v. Ohio*, 426 U.S. 610, 619 (1976); *Griffin v. California*, 380 U.S. 609, 615 (1965); *Williams v. State*, 4 Md. App. 342, 348 n.6, 242 A.2d 813, 817 n.6 (1968); *Younie v. State*, 272 Md. 233, 244-45, 322 A.2d 211, 217-18 (1974); *Zemo v. State*, 101 Md. App. 303, 316, 646 A.2d 1050, 1056-57 (1994); *Miranda v. Arizona*, 384 U.S. 436, 468 n.37 (1966); *Wills v. State*, 82 Md. App. 669, 677, 573 A.2d 80 (1990)).

113. *Id.* at 818, 709 A.2d at 1307-08 (citing *Jenkins*, 447 U.S. at 240-41; *Williams*, 4 Md. App. at 348 n.6, 242 A.2d at 817 n.6).

114. *Id.* at 819, 709 A.2d at 1308 (citing *Williams*, 4 Md. App. at 348 n.6, 242 A.2d at 817 n.6).

115. *Id.* at 819-20, 709 A.2d at 1308-09.

did the defendant have the opportunity to respond; and under the circumstances would a reasonable person in the defendant's position, who disagreed with the statement, have voiced that disagreement. These same factors would then be evaluated by the jury and the tacit admission given the weight that the jury believes it to be worth.¹¹⁶

If the threshold factors were applied, the court believed, there would be no risk of pre-arrest silence being admitted when its potential prejudicial effect outweighed its probative value.¹¹⁷ On this reasoning, the court refused to adopt a per se rule prohibiting the use of pre-arrest silence in the presence of a police officer as substantive evidence of guilt under the tacit admission rule.¹¹⁸

The majority also rejected Key-El's alternative argument that under Maryland evidence law, the trial court abused its discretion by admitting Key-El's pre-arrest silence into evidence as a tacit admission.¹¹⁹ Applying the steps detailed above, the majority determined that circumstances surrounding Key-El's silence did not warrant preclusion of the tacit admission exception.¹²⁰ The court noted that Key-El was in his own home,¹²¹ that he was not being interrogated, that he had not been arrested and informed of his right to remain silent, and that he had every opportunity to respond to his wife's accusation.¹²² The court reasoned that under the circumstances, the trial court could have reasonably concluded that Key-El would have denied his wife's accusation if he believed it to be false.¹²³ Moreover, the court observed that Key-El's silence would help the jury determine whether Mrs. Key-El's trial testimony was credible.¹²⁴ In light of these factors, the majority concluded that "[t]he trial court did not abuse its discretion in allowing the jury to determine the weight to be accorded the tacit admission."¹²⁵

116. *Id.* at 818-19, 709 A.2d at 1308.

117. *Id.* at 819, 709 A.2d at 1308 (stating that when an evaluation of the threshold factors by the court "discloses that the police officer's presence together with the other circumstances demonstrate that a reasonable person in the defendant's position would not be expected to deny or explain the accusation, then the defendant's silence would be excluded from evidence").

118. *Id.* at 819-20, 709 A.2d at 1308-09.

119. *Id.* at 820, 709 A.2d at 1309.

120. *Id.* The court determined that after examining the circumstances in the light of the threshold factors, "the only factor contested was whether [Key-El] would have been expected to deny his wife's accusation made in the presence of a police officer." *Id.*

121. *Id.*

122. *Id.* at 818, 709 A.2d at 1308.

123. *Id.* at 820, 709 A.2d at 1309.

124. *Id.*

125. *Id.*

Having addressed the evidentiary question, the court turned to the question of whether the introduction of Key-El's tacit admission into evidence violated his constitutional rights under the Fifth Amendment.¹²⁶ Relying heavily on the Supreme Court's decision in *Jenkins*, and on Justice Stevens's concurring opinion in that case, the court determined that the use of pre-arrest silence in the presence of a police officer as substantive evidence of guilt was constitutionally permissible if the silence was not compelled by the officer.¹²⁷

Finding no contrary consensus in the federal circuit courts on the issue of whether pre-arrest silence can be admitted as substantive evidence of guilt, the court stated that "[w]hen silence of a defendant in response to an incriminatory accusation is used by the prosecution as the basis for an inference of a tacit admission, the defendant can not validly assert that the privilege against *compelled* self-incrimination has been violated."¹²⁸ The court noted that Key-El was not in custody and was not being interrogated when he remained silent in the face of his wife's accusation, and that he was under "no official compulsion to speak or remain silent" even though a police officer was present.¹²⁹ Concluding that the use of Key-El's pre-arrest silence as a tacit admission did not violate his Fifth Amendment rights, the court affirmed the judgment of the Court of Special Appeals.¹³⁰

In her dissenting opinion, Judge Raker, with whom Judges Bell and Eldridge joined, argued that tacit admissions made in the presence of police officers are too ambiguous to have any probative value and ordinarily should not be admissible as substantive evidence of guilt.¹³¹ The premise underlying the tacit admission exception, the

126. *Id.* The court noted that Key-El did not make an argument that the issue should be resolved any differently under Article 22 of the Maryland Declaration of Rights, which also protects against compelled self-incrimination and has been held to be "in *pari materia* with the Fifth Amendment." *Id.* at 820 n.2, 709 A.2d at 1309 n.2 (citing *Hof v. State*, 337 Md. 581, 586 n.3, 655 A.2d 370, 373 n.3 (1995)).

127. *Id.* at 822-24, 709 A.2d at 1310-11.

128. *Id.* at 824, 709 A.2d at 1311.

129. *Id.* at 824-25, 709 A.2d at 1311.

130. *Id.* at 825, 709 A.2d at 1311.

131. *Id.* (Raker, J., dissenting). Judge Raker noted that the issue presented in the case involved evidence of pre-arrest silence when used to imply that the defendant was guilty, rather than if it were used to impeach that defendant's testimony. *Id.* at 825 n.1, 709 A.2d at 1311 n.1. Judge Raker stated that although the majority allowed Key-El's tacit admission to be admitted to impeach Mrs. Key-El's testimony, it was actually used as substantive evidence of Key-El's guilt because in his closing argument, the prosecutor stated that the defendant remained silent in response to his wife's accusation because he did, in fact, strike her. For this reason, the dissent argued, the majority should have been concerned with whether Key-El's silence was probative of his guilt, rather than with whether it impeached his wife's testimony. *Id.*

dissent observed, is that silence in the face of an accusation is probative of guilt, since an innocent person falsely accused would deny the accusation.¹³² The dissent argued that this premise is invalid when the tacit admission is made in the presence of law enforcement officers because in such a case, the silence is ambiguous at best, due in large part to the well-publicized right to remain silent.¹³³

The dissent examined cases from other jurisdictions in which pre-arrest tacit admissions in the presence of police officers were excluded from evidence on both evidentiary¹³⁴ and constitutional¹³⁵ grounds, and concluded that "[s]ince an individual who is accused of a criminal act in front of a police officer may choose to remain silent based on a general awareness of the popularized right to remain silent, or even out of suspicion or mistrust of the police, silence in the presence of law enforcement officers is ambiguous."¹³⁶ This ambiguity made the probative value of pre-arrest silence minimal.¹³⁷ Therefore, the dissent concluded that "[b]ased on Maryland evidentiary grounds, the tacit admission rule should be inapplicable in the context of accusations made in the presence of law enforcement officers."¹³⁸

4. *Analysis.*—As evidenced by the case law, the tacit admission exception is firmly established in Maryland law.¹³⁹ However, case law also illustrates that silence maintained in the presence of a law enforcement officer stands on different footing than other tacit admissions because such a situation implicates the Fifth Amendment right

132. *Id.* at 827, 709 A.2d at 1312.

133. *Id.* at 833, 709 A.2d at 1315.

134. *Id.* at 828-29, 709 A.2d at 1313 (citing *State v. Kelsey*, 201 N.W.2d 921, 925 (Iowa 1972); *Commonwealth v. Dravec*, 227 A.2d 904, 906-09 (Pa. 1967); *State v. Daniels*, 556 A.2d 1040, 1046 (Conn. App. Ct. 1989)).

135. *Id.* at 829, 709 A.2d at 1313 (citing *United States ex rel. Savory v. Lane*, 832 F.2d 1011, 1017-18 (7th Cir. 1987); *Commonwealth v. Cull*, 656 A.2d 476, 481 n.5 (Pa. 1995); *State v. Villarreal*, 617 P.2d 541, 542 (Ariz. Ct. App. 1980)).

136. *Id.* at 833, 709 A.2d at 1315. The dissent further stated, "[a]s the Supreme Court recently noted, [a]nd as for the possibility that the person under investigation may be unaware of his right to remain silent: In the modern age of frequently dramatized 'Miranda' warnings, that is implausible." *Id.* at 832, 709 A.2d at 1315 (second alteration in original) (internal quotation marks omitted) (quoting *Brogan v. United States*, 118 S. Ct. 805, 810 (1998)).

137. *Id.* at 832, 709 A.2d at 1315.

138. *Id.* at 833, 709 A.2d at 1315. The dissent did not directly address the constitutional issues, reasoning that "courts should not decide constitutional issues unnecessarily." *Id.* at 833 n.4, 709 A.2d at 1314 n.4 (citing *Professional Nurses v. Dimensions Health Corp.*, 346 Md. 132, 139, 695 A.2d 158, 161 (1997); *Middleman v. Maryland*, 232 Md. 285, 289, 192 A.2d 782, 782 (1963)).

139. See *supra* notes 33-34.

against self-incrimination.¹⁴⁰ The *Key-El* court essentially restated and affirmed the validity of tacit admissions in particular circumstances and recognized that pre-arrest silence maintained in response to accusatory statements in the presence of a police officer can be used as substantive evidence of guilt.¹⁴¹ The court applied the proper tests to determine whether silence constitutes a tacit admission. However, by allowing pre-arrest silence to be used as direct evidence of guilt rather than limiting its holding to admitting such silence only to impeach a defendant when he takes the stand in his own defense, the court failed to account properly for the existence of the Fifth Amendment right against self-incrimination, and the possibility that an accused in *Key-El*'s situation might have been asserting that right. The court could have better safeguarded the accused's Fifth Amendment right by holding that pre-arrest silence could not be admitted as substantive evidence of the defendant's guilt.

a. *Use of Pre-Arrest Silence as Substantive Evidence of Guilt Violates the Fifth Amendment.*—The court's conclusion that pre-arrest silence maintained in the presence of police officers may be used as substantive evidence of guilt raises serious constitutional concerns. The majority argued that the presence of the police officer did not, in itself, trigger *Key-El*'s Fifth Amendment right to remain silent.¹⁴² In drawing this conclusion, the court relied on Justice Stevens's concurring opinion in *Jenkins v. Anderson*, in which Justice Stevens maintained that for the Fifth Amendment to be implicated, an accused must assert his right against self-incrimination in response to government coercion.¹⁴³ Because *Key-El* was not in custody and was not being interrogated when he remained silent in the face of his wife's

140. See *Younie v. State*, 272 Md. 233, 244, 322 A.2d 211, 217 (1974) (holding that silence maintained by an accused during a custodial interrogation is assumed to be an exercise of his privilege against self-incrimination); *Wills v. State*, 82 Md. App. 669, 677, 573 A.2d 80, 84 (1990) (holding that post-arrest, pre-*Miranda* warning silence is inadmissible because the probative value is outweighed by the potential for unfair prejudice).

141. See *supra* notes 127-129 and accompanying text (noting that circumstances and conduct of police officer bear on the admissibility of silence in the face of an accusation).

142. *Key-El*, 349 Md. at 825, 709 A.2d at 1311.

143. See *Jenkins v. Anderson*, 447 U.S. 231, 243-44 (1980) (Stevens, J., concurring). Justice Stevens argued:

When a citizen is under no official compulsion whatever, either to speak or to remain silent, I see no reason why his voluntary decision to do one or the other should raise any issue under the Fifth Amendment. For in determining whether the privilege is applicable, the question is whether petitioner was in a position to have his testimony compelled and then asserted his privilege, not simply whether he was silent.

Id. (footnote omitted).

accusation, the court concluded that there was no government coercion, and therefore, the use of Key-El's silence as evidence did not violate his Fifth Amendment right.¹⁴⁴ In holding that Key-El's pre-arrest silence could be used as substantive evidence of guilt, the court improperly elevated the importance of Justice Stevens's concurrence above that of the actual holding in *Jenkins*,¹⁴⁵ as well as the Supreme Court's prior Fifth Amendment jurisprudence.

Miranda v. Arizona established procedural safeguards to insure that an accused is aware of his Fifth Amendment right against self-incrimination in the course of a "custodial interrogation."¹⁴⁶ The *Miranda* Court defined custodial interrogation as "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way."¹⁴⁷ While it is clear that this statement applies to situations where an accused has been taken into police custody and subjected to questioning, the inclusion of the phrase "otherwise deprived of his freedom of action in any significant way" implies that the Fifth Amendment privilege can be triggered in situations outside of formal police interrogations.¹⁴⁸

Key-El was not under formal interrogation or in police custody when his wife made her accusatory statement.¹⁴⁹ However, he could reasonably have believed that his freedom of action was curtailed in a significant way by Officer Johnson's presence. When the officer came to the door and asked if there was a problem, Key-El responded

144. *Key-El*, 349 Md. at 824-25, 709 A.2d at 1311.

145. *Jenkins*, 447 U.S. at 240 (holding that the use of pre-arrest silence to impeach a defendant's credibility does not violate the Constitution). While the court justified its use of Key-El's silence as substantive evidence of guilt based in part on the holding in *Jenkins*, it failed to recognize that the reasoning employed by the majority in *Jenkins* addressed only impeachment situations. See *infra* Section 4(c). Rather, the majority in *Key-El* focused on Justice Stevens's concurrence, which provided stronger support for the proposition that pre-arrest silence could be used as substantive evidence of guilt without violating the Fifth Amendment. *Key-El*, 349 Md. at 824, 709 A.2d at 1311 (citing *Jenkins*, 447 U.S. at 243-44 (Stevens, J., concurring)).

146. *Miranda v. Arizona*, 384 U.S. 436, 444 (1966); see also *supra* notes 52-56 and accompanying text (noting that police officers must apprise an accused of his right to remain silent before a custodial interrogation begins).

147. *Miranda*, 384 U.S. at 444.

148. See *id.* at 467 (stating that the Fifth Amendment "serves to protect persons in all settings in which their freedom of action is curtailed in any significant way from being compelled to incriminate themselves"); see also *Rhode Island v. Innis*, 446 U.S. 291, 301 (1980) (noting that "the term 'interrogation' under *Miranda* refers not only to express questioning, but also to any words or actions on the part of the police . . . that the police should know are reasonably likely to elicit an incriminating response from the suspect." (footnote omitted)).

149. *Key-El*, 349 Md. at 824, 709 A.2d at 1311.

“no.”¹⁵⁰ In response to the indication by Mrs. Key-El that there was a problem, Officer Johnson entered the house.¹⁵¹ Whether guilty or innocent, Key-El likely believed that he could not simply leave the house or even the room while Officer Johnson was speaking to Mrs. Key-El. It is unrealistic, therefore, to maintain that Key-El’s freedom of action was not impacted by the presence of the police.

To understand the Fifth Amendment privilege against self-incrimination as a right that is triggered only at the point where the accused is taken into custody and read his *Miranda* warning is to improperly limit the protection of the Fifth Amendment.¹⁵² The *Key-El* court concluded that “[a]lthough a police officer was present, [Key-El] was under no official compulsion to speak or remain silent.”¹⁵³ However, if Key-El remained silent after having been read his *Miranda* rights, the government would not be allowed to comment on that silence, even if Key-El was under no official compulsion to speak or remain silent. Nevertheless, the court maintained that since Key-El was neither in custody nor under interrogation, “[h]is silence gave rise to a permissible inference” and “[t]he use of it in evidence did not burden his Fifth Amendment privilege.”¹⁵⁴

Drawing such a bright line between the pre-arrest context, where the silence of the accused is admissible, and the post-arrest context, where the silence of the accused suddenly and automatically becomes inadmissible, leads to the untenable conclusion that an individual can safely assert his Fifth Amendment rights only after he has been placed under arrest and read his *Miranda* rights. In holding that comment by the government about an accused’s post-arrest silence is inadmissible, the Supreme Court in *Doyle v. Ohio*¹⁵⁵ stated that “[s]ilence in the wake of [*Miranda*] warnings may be nothing more than the arrestee’s exercise of these *Miranda* rights,” thereby making all post-arrest silence “insolubly ambiguous.”¹⁵⁶ The Court recognized that although the accused might not be relying on his Fifth Amendment rights in

150. *Id.* at 813, 709 A.2d at 1305.

151. *Id.*

152. See *Kastigar v. United States*, 406 U.S. 441, 444 (1972) (recognizing that the privilege against self incrimination can be asserted in any investigatory or adjudicatory proceeding); *Quinn v. United States*, 349 U.S. 155, 162 (1955) (invocation of Fifth Amendment rights “does not require any special combination of words”); see also *United States ex rel. Savory v. Lane*, 832 F.2d 1011, 1017 (7th Cir. 1987) (“The right to remain silent, unlike the right to counsel, attaches before the institution of formal adversary proceedings.”).

153. *Key-El*, 349 Md. at 825, 709 A.2d at 1311.

154. *Id.*

155. 426 U.S. 610 (1976).

156. *Id.* at 617.

maintaining his silence, State comment on that silence would not be allowed in order to safeguard the accused's Fifth Amendment rights.

The *Key-El* court should have taken the same precaution by holding that *Key-El*'s pre-arrest silence could not be entered into evidence as substantive evidence of his guilt. While *Key-El*'s silence was ambiguous, it is at least possible that he was relying on his Fifth Amendment right against self-incrimination when he remained silent in the face of his wife's accusation.¹⁵⁷ The only way to insure that an individual in a pre-arrest situation will receive the full measure of protection guaranteed by the Fifth Amendment, therefore, is to maintain that the right against self-incrimination is triggered from the initial encounter of the accused with the law enforcement officer and to bar the government from using any silence maintained by the accused in the presence of a law enforcement officer as substantive evidence of guilt.¹⁵⁸

b. The Probative Value of Key-El's Silence was Diminished Due to the Presence of the Police Officer.—The existence of the Fifth Amendment right, even if not technically triggered in a pre-arrest situation such as the one in *Key-El*, makes the silence so ambiguous as to be of little probative value. Consequently, on evidentiary grounds, pre-arrest silence maintained in the presence of a police officer should be inadmissible as substantive evidence of guilt in most cases.

Although *Jenkins* concluded that the admissibility of pre-arrest silence for impeachment purposes is a question of state evidentiary law,¹⁵⁹ the Supreme Court's decision in *United States v. Hale*¹⁶⁰ illus-

157. The Maryland Court of Appeals used similar reasoning in determining that post-arrest, pre-*Miranda* warning silence was inadmissible in *Younie v. State*, 272 Md. 233, 322 A.2d 211 (1974). The *Younie* court noted:

Since a waiver of [the Fifth Amendment right to remain silent] to be effective must be clearly and intentionally made, and since silence, even in the face of incriminating accusations, statements, or questions, is inaction and therefore difficult to draw an inference from, in a situation such as this where it is uncertain as to what occurred, we must assume that the petitioner's failure to answer was an invocation of his fifth amendment privilege.

Id. at 245, 322 A.2d at 217.

158. See Aaron R. Pettit, Comment, *Should the Prosecution be Allowed to Comment on a Defendant's Pre-Arrest Silence in its Case-in-Chief?*, 29 LOY. U. CHI. L.J. 181 (1997). The author expressed the following opinion:

The Fifth Amendment does not provide that no person shall be compelled in any criminal case to be a witness against himself *unless he has not been read his Miranda rights*. No evidence exists that the drafters of the Constitution intended to limit the full protections of the Fifth Amendment to persons in custody or persons informed of their rights.

Id. at 215-16 (footnote omitted).

159. *Jenkins v. Anderson*, 447 U.S. 231, 240 (1980).

160. 422 U.S. 171 (1975).

trates the proper way in which a state court should evaluate such a question. In *Hale*, the Court ruled that post-arrest silence could not be used to impeach a defendant's credibility because "[i]n most circumstances silence is so ambiguous that it is of little probative force."¹⁶¹ The minimal probative value of such silence weighed against the "significant potential for prejudice"¹⁶² toward the defendant led the Court to conclude that such evidence should be excluded.¹⁶³

In *Wills*, the Court of Special Appeals applied this reasoning in determining that post-arrest, pre-*Miranda* warning silence could not be used to impeach the testimony of a defendant.¹⁶⁴ The court reasoned that the probative value of such evidence is outweighed by its potential for unfair prejudice toward the defendant because at the time of arrest, there are a number of reasons, other than acquiescence in the truth of the accusation, why an innocent individual would remain mute in the face of an accusation.¹⁶⁵ The court explained:

In these often emotional and confusing circumstances, a suspect . . . may have felt there was no need to reply. He may have maintained silence out of fear or unwillingness to incriminate another. Or the arrestee may simply react with silence in response to the hostile and perhaps unfamiliar atmosphere surrounding his detention.¹⁶⁶

Although the Supreme Court and other courts have taken a more moderate stance on the use of pre-arrest silence for impeachment,¹⁶⁷ the reasoning in *Hale* and *Wills* is persuasive when the issue is whether to allow pre-arrest silence as substantive evidence of guilt.¹⁶⁸ Moreover, Maryland case law recognizes that if there is another reasonable

161. *Id.* at 176. The majority did not address the Fifth Amendment issue. However, in his concurrence, Justice White foresaw *Doyle v. Ohio*, 426 U.S. 610 (1976) when he commented that the Court's decision should have rested on a constitutional basis. *Id.* at 182-83 (White, J., concurring); see also *supra* notes 71-79 and accompanying text.

162. *Hale*, 422 U.S. at 180.

163. *Id.*

164. *Wills v. State*, 82 Md. App. 669, 677, 573 A.2d 80, 84 (1990).

165. *Id.* at 677-78, 573 A.2d at 85.

166. *Id.* at 678, 573 A.2d at 85 (omission in original) (quoting *Hale*, 422 U.S. at 177)).

167. See *infra* note 172 and accompanying text (noting the reasons why courts have allowed the use of pre-arrest silence to impeach a defendant).

168. Although *Hale* did not comment on the probative value of silence occurring before arrest, several jurisdictions have weighed the probative value of an accused's silence against the potential prejudicial effect of silence in determining that pre-arrest silence may not be used as substantive evidence of an accused's guilt. See *State v. Daniels*, 556 A.2d 1040, 1046-47 (Conn. App. Ct. 1989) (recognizing that the emotional state of the accuser and the presence of a police officer rendered silence of the accused void of probative value); *Commonwealth v. Dravcecz*, 227 A.2d 904, 906 (Pa. 1967) (attacking the premise that when a

explanation for why an accused would remain silent in the face of an accusation, other than acquiescence in the truth of the accusation, then the accused's silence is too ambiguous to be entered in evidence as a tacit admission.¹⁶⁹ If the *Key-El* court had applied the reasoning of *Hale*, *Wills*, and the other Maryland cases limiting the use of ambiguous silence as tacit admissions, it would have determined that Key-El's pre-arrest silence was inadmissible as substantive evidence of guilt on evidentiary grounds.

As Judge Wilner of the Court of Special Appeals noted, the *Miranda* warnings have received so much public exposure through television and popular culture that an accused such as Key-El might have reasonably believed that he should remain silent in the face of a false accusation while a police officer was present.¹⁷⁰ The presence of the police officer, the likelihood that Key-El was aware of the right against self-incrimination, as well as the emotionally charged atmosphere in the Key-El home prior to the arrest, leads to the conclusion that there might have been other plausible explanations why Key-El would remain silent in the face of his wife's accusation, even if the accusation was false.¹⁷¹ Because Key-El's silence is open to several interpretations, his silence was of little or no probative value, and it should not have been admitted as substantive evidence of his guilt.

c. *The Court Failed to Recognize the Distinction Between Using Pre-Arrest Silence as Substantive Evidence of Guilt and Using Such Silence for Impeachment Purposes.*—While few courts permit the use of pre-arrest silence as substantive evidence of guilt, many who have considered the question allow the use of such silence for impeachment purposes if

person remains silent in response to an incriminating statement, he is admitting the truth of that statement).

169. See *Ewell v. State*, 228 Md. 615, 619, 180 A.2d 857, 860 (1962) (requiring a tacit admission to be made "in an environment and in the presence of actors such that a reply might naturally have been expected"); *Zink v. Zink*, 215 Md. 197, 202, 137 A. 2d 139, 142 (1957) (deciding that silence in the face of a statement may constitute an adoption of that statement only when "no other explanation is equally consistent with silence"); *Barber v. State*, 191 Md. 555, 565, 62 A.2d 616, 620 (1948) ("[I]f it appears that the failure to deny is attributable to fear, the advice of counsel, or the desire to exercise an assumed or asserted right against self-incrimination, it has been held that no inference of guilt can properly be drawn." (citing *People v. Simmons*, 172 P.2d 18 (Cal. 1946) (in bank))).

170. *Key-El v. State*, No. 65, concurring slip op. at 1 (Md. Ct. Spec. App. Nov. 22, 1996) (Wilner, J., concurring) ("Although the Supreme Court has required that the police give such a warning directly when engaging in custodial interrogations, the public at large, I expect, assumes that incriminating statements made at any time may come to haunt the accused.").

171. See *Daniels*, 556 A.2d at 1046 (determining that the emotional state of the victim and the presence of a police officer rendered the defendant's silence void of probative value).

the defendant takes the stand to testify.¹⁷² In *Jenkins*, the Supreme Court held that the use of pre-arrest silence for *impeachment* purposes did not violate the Fifth Amendment, but it made no comment on the constitutionality of such silence as direct evidence of guilt.¹⁷³ Several courts have recognized that the impeachment/substantive evidence distinction is crucial when deciding whether to allow a defendant's pre-arrest silence into evidence.¹⁷⁴

In *Key-El*, the majority never clearly addressed the impeachment/substantive evidence distinction. The majority seemed to couch its decision to allow Key-El's pre-arrest silence into evidence in terms of impeachment, noting that his silence would be highly probative when the jury was determining whether Mrs. Key-El's trial testimony was credible.¹⁷⁵ However, the majority also noted that the federal circuit courts were split on the issue of whether pre-arrest silence can be used as substantive evidence of guilt when the defendant does not testify¹⁷⁶ and stated that "[t]he Supreme Court of the United States has never decided the question presented to us in the instant case."¹⁷⁷

In her dissent, Judge Raker noted that Key-El's silence was used as substantive evidence of his guilt because in its closing argument, the prosecution stated that "[a] person in the position of the defendant, truly innocent, who did not do these things would have been expected to protest. . . . The defendant does not do that. He doesn't do that

172. In *Harris v. New York*, 401 U.S. 222 (1971), the Supreme Court stated:

Every criminal defendant is privileged to testify in his own defense, or to refuse to do so. But that privilege cannot be construed to include the right to commit perjury Having voluntarily taken the stand, petitioner was under an obligation to speak truthfully and accurately, and the prosecution here did no more than utilize the traditional truth-telling devices of the adversary process.

Id. at 225; see also *United States ex rel. Savory v. Lane*, 832 F.2d 1011, 1017 (7th Cir. 1987) (noting that impeachment is employed by the state to detect perjury, and that a defendant does not have a constitutional right to perjure himself).

173. *Jenkins v. Anderson*, 447 U.S. 231, 238 (1980) ("[I]mpeachment follows the defendant's own decision to cast aside his cloak of silence and advances the truth-finding function of the criminal trial").

174. See *Lane*, 832 F.2d at 1017-18 (distinguishing between the use of pre-arrest silence as substantive evidence of guilt and as impeachment evidence); *People v. Cetlinski*, 460 N.W.2d 534, 542-44 (Mich. 1990) (noting that use of pre-arrest silence for impeachment does not violate the Fifth Amendment, but that use of such silence to infer guilt would violate the Fifth Amendment).

175. See *Key-El*, 349 Md. at 820, 709 A.2d at 1309. This impeachment justification is suspect. Courts have allowed the use of a defendant's pre-arrest silence for impeachment purposes when that defendant himself takes the stand. However, research has not uncovered any cases where a court has allowed the use of a defendant's pre-arrest silence to impeach a defense witness when the defendant decides not to testify. In such a situation, Fifth Amendment problems would remain.

176. *Id.* at 823, 709 A.2d at 1310.

177. *Id.* at 820-21, 709 A.2d at 1309.

because he was, in fact, the person who struck her."¹⁷⁸ As the dissent makes clear, the issue before the court was whether a defendant's pre-arrest silence could be used as substantive evidence of guilt when the defendant does not take the stand in his own defense.¹⁷⁹

Use of pre-arrest silence to confront a defendant who takes the stand to testify in his own defense serves an important truth-finding purpose. As the Supreme Court noted in *Jenkins*, when a defendant chooses to testify at trial, the state should be allowed to raise the issue of the defendant's pre-arrest silence when such silence would shed light on the truth or falsity of the defendant's testimony.¹⁸⁰ By taking the stand, the defendant forfeits his Fifth Amendment right against self-incrimination because he opens the door to cross-examination by the prosecution.¹⁸¹

Using the pre-arrest silence of a defendant such as Key-El who chooses not to testify as substantive evidence of his guilt, however, offends both the Fifth and the Fourteenth Amendments. Key-El never opened the door to comment by the state concerning his pre-arrest silence. Therefore, his Fifth Amendment privilege against self-incrimination should remain intact.

While use of pre-arrest silence for impeachment purposes passes Fifth Amendment scrutiny, the evidentiary problems discussed in section 4(b) remain. This is why *Jenkins* left it up to the states to decide whether to allow use of such testimony under their own rules of evidence.¹⁸² The threshold tests employed by the majority in *Key-El*, however, would serve to exclude silence that is likely the result of some factor other than the accused's knowledge of his own guilt.¹⁸³ In cases where it is uncertain whether the pre-arrest silence has any probative value even after the application of threshold tests, a court might be justified in allowing the silence in evidence simply because the defendant, unlike a defendant who chooses not to take the stand, would have an opportunity to explain his silence.

The *Key-El* court, therefore, applied the correct test in the wrong context. If Key-El had taken the stand in his own defense, the trial court would have been correct in applying threshold tests to determine whether his pre-arrest silence had any value as impeachment

178. *Id.* at 825 n.1, 709 A.2d at 1311 n.1 (Raker, J., dissenting) (quoting Transcript).

179. *Id.*

180. *Jenkins v. Anderson*, 447 U.S. 231, 237-38 (1980).

181. *Id.* at 238.

182. *Id.* at 240.

183. See *supra* note 116 and accompanying text (noting the threshold test employed by the court in *Key-El*).

evidence. Because Key-El did not take the stand, however, use of his pre-arrest silence as substantive evidence of guilt should not have been permitted.

5. *Conclusion.*—Maryland courts have long recognized tacit admissions as valid evidence in certain situations. Silence, like a statement or a gesture, can have meaning and can give the court and the jury insight into the guilt or innocence of a defendant. However, the Maryland courts have also recognized that silence can be ambiguous. To insure that the probative value of an accused's silence outweighs the possible prejudicial effect, a number of threshold tests must be applied to insure that in a given situation, the accused would have no other reason for remaining silent in the face of an accusation aside from acquiescence in the truth of the accusation.

Pre-arrest silence maintained in the presence of a police officer, however, should be inadmissible as substantive evidence of the defendant's guilt for two reasons. First, use of such silence violates the accused's Fifth Amendment right against self-incrimination. Because the pre-arrest situation might be perceived as coercive by the accused, the court should make the assumption that the accused was relying on his right against self incrimination when remaining silent. This is the assumption Maryland courts are required to make after an accused has been given *Miranda* warnings,¹⁸⁴ and when an accused is in police custody before *Miranda* warnings have been given.¹⁸⁵ To insure that Fifth Amendment rights are protected consistently, this same assumption should be made in pre-arrest situations such as the one in *Key-El*.

Second, even if the court does not acknowledge that pre-arrest silence violates the Fifth Amendment, the mere possibility that the defendant is asserting a perceived right to remain silent renders the silence too ambiguous to be of probative value as substantive evidence of guilt. Under the threshold tests established by the Maryland courts, such silence should be inadmissible as substantive evidence of guilt.

Although use of pre-arrest silence as substantive evidence of guilt should be prohibited, courts have held that use of pre-arrest silence to impeach the credibility of a defendant who takes the stand to testify in his own defense does not violate the Fifth Amendment. In such a situation, a court should apply a test such as the one applied by the *Key-El* court to determine whether the defendant's pre-arrest silence has any probative value. If the facts of this case were different, and

184. See *Younie v. State*, 272 Md. 233, 245, 322 A.2d 211, 217 (1974).

185. See *Wills v. State*, 82 Md. App. 669, 677, 573 A.2d 80, 84 (1990).

Key-El himself took the stand to testify about what happened in his home on the night of August 19, 1994, the Court of Appeals's analysis would have been correct. By failing to recognize the critical distinction between use of pre-arrest silence as substantive evidence of guilt and as impeachment evidence, however, the Court of Appeals improperly applied the tacit admission rule at the expense of the individual's right to remain silent under the Fifth Amendment.

MICHAEL K. LAVANGA

B. Judicial Discretion and Problems of Perception

In *Gunning v. State*,¹⁸⁶ the Court of Appeals held that the decision of whether to give a jury instruction on the reliability of eyewitness testimony should be left to a trial judge's sound discretion.¹⁸⁷ The court decided this case in conjunction with *Harris v. State* because both cases presented the same issue and were heard at trial before the same judge.¹⁸⁸ In both cases, the Court of Appeals decided that the trial judge abused his discretion in failing to give the required jury instructions.¹⁸⁹ The court's determination that the decision to give or withhold this jury instruction lies within the trial judge's discretion is consistent with its emphasis in previous cases on ensuring that jury instructions be appropriately tailored to the case.¹⁹⁰ In refusing either to adopt a mandatory instruction or to bar such instructions completely, the court implied that eyewitness identifications should be considered under the same standards as other types of evidence.¹⁹¹ The court's decision, however, overlooked the problems peculiar to eyewitness testimony. In comparison to other evidence, eyewitness identifications of strangers are scientifically unreliable, yet unusually convincing.¹⁹² Therefore, requiring a jury instruction when particular

186. 347 Md. 332, 701 A.2d 374 (1997).

187. *Id.* at 345, 701 A.2d at 380.

188. *Id.* at 335, 701 A.2d at 375.

189. *Id.*

190. *See, e.g.*, *Henry v. State*, 324 Md. 204, 248-49, 596 A.2d 1024, 1046 (1991) ("In deciding whether the trial court was required to give such an instruction, we must determine . . . whether it is applicable under the facts and circumstances of this case . . ." (quoting *Hunt v. State*, 321 Md. 387, 442-43, 583 A.2d 218, 245 (1990))). *See generally* MD. RULE 4-325(c) (permitting the court upon its own initiative, and requiring it at the request of any party, to instruct the jury as to the "applicable law").

191. *See Gunning*, 347 Md. at 347, 701 A.2d at 381 (noting that "[t]he inclusion of [an] evidentiary instruction did not remove the . . . instruction from the category of 'applicable law,' and the same is true for the identification instruction").

192. *See infra* notes 369-370 and accompanying text (discussing the persuasive nature of eyewitness identifications); *infra* notes 406-410 and accompanying text (discussing the great deference juries tend to give eyewitness identifications).

circumstances are present in a case would decrease the risk of unjust convictions based on misidentification. Such circumstances could include those suggested by the Fourth Circuit: a strong possibility of misidentification, unusual witness uncertainty in the identification, or other particular difficulties with the identification.¹⁹³

1. *The Case.*—

a. *Gunning.*—On February 4, 1994, Marie Hoopes was attacked near her home in Baltimore as she and her husband were getting into their car.¹⁹⁴ A man grabbed her, held a knife to her throat, and snatched her purse.¹⁹⁵ Although Mrs. Hoopes was unable to see the man's face, her husband, William Hoopes, who was seated in the driver's seat of the vehicle, later testified that from his position he was able to see the attacker.¹⁹⁶ Mr. Hoopes stated that he was approximately two feet from the assailant, described the man's clothes, estimated his height, and said that he had a mustache.¹⁹⁷ The robbery lasted "a couple of seconds."¹⁹⁸

Mark D. Gunning, Sr. was charged with robbery with a deadly weapon and related offenses arising out of the attack on Mrs. Hoopes.¹⁹⁹ Through a pretrial photo array and an in-court statement, Mr. Hoopes identified Gunning as the assailant.²⁰⁰ At trial in the Circuit Court for Baltimore City, Gunning presented evidence in support of an alibi defense that he was watching a video at the time of the robbery with his father, his sister, and a friend.²⁰¹ Mr. Hoopes's testimony was the only evidence admitted against the defendant.²⁰²

193. *United States v. Brooks*, 928 F.2d 1403, 1409 (4th Cir. 1991). *Brooks*, however, did not adopt a rule requiring an eyewitness instruction, but a "flexible approach" whereby a trial court may give the instruction when such circumstances are present. *Id.* at 1408.

194. *Gunning*, 347 Md. at 335, 701 A.2d at 375.

195. *Id.* at 336, 701 A.2d at 375.

196. *Id.*

197. *Id.*, 701 A.2d at 375-76.

198. *Id.* at 360, 701 A.2d at 388 (Raker, J., and Wilner, J., concurring in part and dissenting in part) (quoting the victim's testimony).

199. *Gunning*, 347 Md. at 335, 701 A.2d at 375.

200. *Id.* at 336, 701 A.2d at 376.

201. *Id.* at 360-61, 701 A.2d at 388 (Raker, J., and Wilner, J., concurring in part and dissenting in part). Gunning's alibi defense included testimony from his sister and father as to the length of the movie and the times at which Gunning was home watching it. *Id.* Gunning also presented the testimony of his friend, who stated that, when he loaned out movies, he always recorded the loan in a journal. *Id.* The journal, which was produced at trial, showed that Gunning's father borrowed *Scarface* on the date of the attack. *Id.*

202. *Gunning*, 347 Md. at 335, 701 A.2d at 375.

At the close of evidence, Gunning's counsel provided the court with two proposed jury instructions. One was an identification instruction, MICPEL pattern instruction MPCJI-Cr 3:30;²⁰³ counsel also requested that the judge read a mistaken identity instruction that substantially followed *Maryland Criminal Jury Instructions*, section 5.10.²⁰⁴ The trial judge refused to give either instruction, stating that "[i]dentification is a[n] issue of fact, not of law,"²⁰⁵ and that "[t]here is no issue of law that requires instruction to the jury on

203. *Id.* at 336, 701 A.2d at 376. The proposed instruction stated in pertinent part:

[Y]ou should consider the witness'[s] opportunity to observe the criminal act and the person committing it, including the length of time the witness had to observe the person committing the crime, the witness'[s] state of mind and any other circumstance surrounding the event. You should also consider the witness' certainty or lack of certainty, the accuracy of any prior description and the witness'[s] credibility or lack of credibility, as well as any other factor surrounding the identification. [You have heard evidence that prior to this trial, a witness identified the defendant by ____.] It is for you to determine the reliability of any identification and to give it the weight you believe it deserves.

The identification of the defendant by a single eyewitness, as the person who committed the crime, if believed beyond a reasonable doubt, can be enough evidence to convict the defendant. However, you must examine the identification of the defendant with great care.

Id. at 336-37, 701 A.2d at 376 (alterations in original) (quoting MICPEL, MARYLAND CRIMINAL PATTERN JURY INSTRUCTIONS MPCJI-Cr 3:30 (1995)).

204. *Id.* at 337, 701 A.2d at 376. The proposed instruction stated:

Evidence has been introduced that William Hoopes is mistaken in identifying the defendant as the perpetrator of the crime.

Whether or not a witness has adequately identified the defendant as the perpetrator of the crime is a question solely for you to decide. In other words, the credibility of the witness is a matter for your consideration and determination. In reaching your determination, you may consider such factors as any mistake, hesitancy or inconsistency on the part of the identifying witness.

Specifically, you may consider the opportunity of the witness to view the person committing the criminal acts at the time of the crime, including: (1) how long the encounter lasted; (2) the distance between the various persons; (3) the lighting conditions at the time; (4) the witness'[s] state of mind at the time of the offense; and (5) the witness'[s] degree of attention to the offender during the commission of the offense.

Also, you may consider the accuracy of the witness'[s] prior description of the criminal, if any; the certainty or lack of certainty expressed by the witness; the demeanor and conduct of the witness making the identification; and any other direct or circumstantial evidence which may identify the person who committed the offense charged or which corroborates—that is, strengthens—or negates the identification of the defendant by the witness.

Id. (alterations in original) (quoting DAVID E. AARONSON, MARYLAND CRIMINAL JURY INSTRUCTIONS AND COMMENTARY § 5.10 (2d ed. 1988)).

205. *Id.* at 338, 701 A.2d at 376-77 (second alteration in original).

identification.”²⁰⁶ The jury convicted Gunning of all charges, and the trial judge sentenced him to ten years imprisonment.²⁰⁷

Gunning appealed to the Court of Special Appeals on the grounds that the trial court erred in failing to suppress the photographic identification and in failing to give the eyewitness identification instruction.²⁰⁸ On the first issue, Gunning argued that the photo array shown to Mr. Hoopes was impermissibly suggestive.²⁰⁹ Second, Gunning contended that the proposed instructions described the law applicable to the case and should have been given.²¹⁰ The Court of Special Appeals affirmed the convictions.²¹¹ The court held that the evidence offered by Gunning did not suggest that the array shown to Mr. Hoopes was so unfair as to infringe on Mr. Gunning’s right to due process of law.²¹² Furthermore, the court found that Gunning’s objection to the jury instructions had not been properly preserved for review.²¹³

b. Harris.—On June 11, 1995, as Mildred Dennis walked down a street in Baltimore City, her purse was snatched.²¹⁴ Robin Carponetto witnessed the attack from the window of her place of employment across the street.²¹⁵ While Dennis never saw the face of the man who attacked her,²¹⁶ Carponetto gave the police a description of the attacker, including details about the attacker’s complexion, clothing, and distinctive keloid scars.²¹⁷ Carponetto subsequently identified Gary L. Harris from a photographic array.²¹⁸

Harris was charged with battery and theft.²¹⁹ At his trial in Baltimore City Circuit Court, Carponetto was the only witness who saw the

206. *Id.* (emphasis omitted).

207. *Id.*, 701 A.2d at 377.

208. *Gunning v. State*, No. 2031, slip op. at 1 (Md. Ct. Spec. App. filed Aug. 8, 1995) (per curiam).

209. *Id.* at 2.

210. *Id.* at 1.

211. *Id.* at 8.

212. *See id.* at 3-5 (identifying appellant’s burden and explaining why he failed to meet it).

213. *Id.* at 6.

214. *Gunning*, 347 Md. at 358, 701 A.2d at 387 (Raker, J., and Wilner, J., concurring in part and dissenting in part).

215. *Id.*

216. *Id.*

217. *Id.*

218. *Gunning*, 347 Md. at 338, 701 A.2d at 377.

219. *Id.*

attack, and Harris presented no evidence on his own behalf.²²⁰ Defense counsel requested MICPEL pattern instruction MPCJI-Cr 3:30,²²¹ the same instruction that Gunning requested at his trial.²²² The trial judge refused, as he had in response to Gunning's request, stating that he "never [gave] that instruction" and reiterating his belief that identification was a pure issue of fact and thus inappropriate for jury instruction.²²³ Harris was convicted on both counts, and the trial judge imposed concurrent sentences of five years imprisonment for the battery conviction and eighteen months imprisonment for the theft conviction.²²⁴ Harris appealed, claiming that the trial court erred in declining to give the eyewitness identification instruction.²²⁵ Before the intermediate appellate court could review Harris's case, the Maryland Court of Appeals issued a writ of certiorari sua sponte to determine whether the trial judge erred in refusing to give the requested instruction.²²⁶ It also granted certiorari in Gunning's case, and ordered the two to be argued on the same day,²²⁷ in order to consider the propriety of the trial judge's prohibition against giving a jury instruction on eyewitness identification.²²⁸

2. *Legal Background.*—By the time of *Gunning v. State*, the Court of Appeals had firmly established the importance of judicial discretion over jury instructions.²²⁹ In *Gunning*, the court considered the appropriate judicial response to a request for an instruction specifically covering eyewitness identification.²³⁰

a. *The Application of Judicial Discretion.*—Jury instructions have long been the province of judicial discretion.²³¹ By definition, discretion must be exercised whenever there is no rule to guide a

220. *Id.* at 359, 701 A.2d at 387 (Raker, J., and Wilner, J., concurring in part and dissenting in part).

221. *See supra* note 203 (setting forth the pertinent text of the instruction).

222. *Gunning*, 347 Md. at 338-39, 701 A.2d at 377.

223. *Id.* at 339, 701 A.2d at 377.

224. *Id.*

225. *See* Appellant Harris's Brief at 3, *Gunning v. State*, 347 Md. 332, 701 A.2d 374 (1997) (No. 132).

226. Brief of Appellee at 1-2, *Gunning v. State*, 347 Md. 332, 701 A.2d 374 (1997) (No. 132) (noting that the Court of Appeals "on its own motion issued a writ of certiorari to review this case prior to decision by the Court of Special Appeals").

227. *Id.* at 2 n.1.

228. *Gunning*, 347 Md. at 339, 701 A.2d at 377.

229. *See, e.g.*, *Robinson v. State*, 315 Md. 309, 318-19, 554 A.2d 395, 399 (1989) (stating that the decision to grant or refuse a missing witness jury instruction is "within the discretion of the trial judge").

230. *Gunning*, 347 Md. at 339-41, 701 A.2d at 377-78.

231. *See supra* note 229.

judge.²³² In Maryland, the Court of Appeals has defined judicial discretion as "sound judgment exercised with regard to what is right under the circumstances and without doing so arbitrarily or capriciously."²³³ Thus, judicial discretion includes subjective and objective components: while judges must tailor a decision left to their discretion to the specific facts of the case, they must also draw conclusions by applying certain constant factors that serve to guide their discretion.²³⁴ Moreover, while the sound exercise of judicial discretion requires judges to weigh the specific evidence in a case in order to reach decisions, judges may not reach conclusions that lie within the province of the jury.²³⁵ Maryland courts consider the jury to be the "exclusive judge"²³⁶ of matters of fact. In matters of law, however, "the jury's role . . . is limited to resolving conflicting interpretations of the legal effect of the evidence and disputes concerning the substantive law of the crime for which there is a sound basis."²³⁷ Maryland courts have delineated the boundary between the proper exercise of judicial discretion and infringement on matters properly decided by a jury in a number of specific contexts, including jury instructions.

In *Dempsey v. State*,²³⁸ the Court of Appeals explored the tension between a court's dual responsibility to provide guidance to the jury and to refrain from trespassing on matters within its province.²³⁹ In *Dempsey*, the trial judge, after admitting the defendant's confession, informed the jury that he believed the confession to be "a voluntary statement in every regard," but added that the jury was the final arbiter of this issue.²⁴⁰ On review, the Court of Appeals held this remark to be an impermissible comment on a question of fact, properly decided only by the jury.²⁴¹ The court noted that, although a judge ini-

232. See, e.g., *Colter v. State*, 297 Md. 423, 427, 466 A.2d 1286, 1288-89 (1983) ("Implicit in the definition [of judicial discretion] is the concept that judicial discretion applies absent a hard and fast rule.").

233. *In re Don Mc.*, 344 Md. 194, 201, 686 A.2d 269, 272 (1996) (quoting *State ex rel. Carroll v. Junker*, 482 P.2d 775, 784 (Wash. 1971)).

234. See, e.g., *id.* at 201-02, 686 A.2d at 272-73 (listing several factors for determining if a juvenile should perform restitution as an example of "objective criteria" that allow a judge acting within her discretion to draw conclusions).

235. See *Gore v. State*, 309 Md. 203, 214, 522 A.2d 1338, 1343 (1987) (stating that "the individual and total weight assigned to the evidence is within the exclusive province of the jury" as long as there is legally sufficient evidence to support the conviction).

236. *Id.* at 210, 522 A.2d at 1341.

237. *Id.*

238. 277 Md. 134, 355 A.2d 455 (1976).

239. See *id.* at 136, 355 A.2d at 456 (holding as error a trial judge's instruction to the jury that the judge had found the defendant's confession to be voluntary).

240. *Id.*

241. *Id.* at 150, 355 A.2d at 463.

tially determines the voluntariness and hence admissibility of a confession as a mixed issue of law and fact,²⁴² the judge may not discuss the decision with the jury.²⁴³ While the court acknowledged that "it is sometimes difficult for the Court to assign reasons for its rulings without saying something that may unintentionally affect the jury,"²⁴⁴ the *Dempsey* court nevertheless found that, by commenting on the evidence in this way, the trial judge committed reversible error.²⁴⁵

In addition to considering the facts of a case, the exercise of judicial discretion may require a judge to consider certain judicially-created factors.²⁴⁶ One purpose of these factors is to guide judges, so that they must consider the facts of the case in light of these factors, instead of applying a rigid rule of their own.²⁴⁷ Thus, in *Colter v. State*,²⁴⁸ the Court of Appeals found reversible error in a trial judge's refusal to allow an alibi witness to testify as a sanction for a violation of discovery procedures.²⁴⁹ This refusal was error because the judge had failed to consider the nature of the discovery violation, the prejudice to the parties by the violation, the timing of the ultimate disclosure of the alibi witness, and possible reasons for the violation.²⁵⁰

More generally, *Colter* emphasized that when a judge is granted discretion over a matter, he or she must in fact exercise that discretion.²⁵¹ A failure to exercise discretion may constitute reversible error as surely as an active abuse of discretion.²⁵² The *Colter* court noted that adopting a blanket rule of procedure does not constitute an exercise of discretion.²⁵³ If a trial judge has discretionary authority over a

242. *Id.* at 144, 355 A.2d at 460 (quoting *Gill v. State*, 265 Md. 350, 357-58, 289 A.2d 575, 579 (1972)).

243. *Id.* at 148-49, 355 A.2d at 463.

244. *Id.* at 149, 355 A.2d at 463 (quoting *Coffin v. Brown*, 94 Md. 190, 203, 50 A. 567, 575 (1901)).

245. *Id.* at 154, 355 A.2d at 465.

246. *See, e.g.*, *Colter v. State*, 297 Md. 423, 428, 466 A.2d 1286, 1289 (1983) (listing several factors relevant to determining when the exclusion of alibi testimony constitutes reversible error (quoting *Taliaferro v. State*, 295 Md. 376, 390-91, 456 A.2d 29, 37 (1983))).

247. *See id.* (criticizing a trial judge for applying a "hard and fast rule" of not granting a continuance, instead of deciding the issue in light of the relevant factors).

248. 297 Md. 423, 466 A.2d 1286 (1983).

249. *Id.* at 428-30, 466 A.2d at 1289-90.

250. *Id.*

251. *See id.* at 426, 466 A.2d at 1288 (noting that "when a court has discretion to act, it must exercise that discretion as that is one of its functions").

252. *See id.* at 431, 466 A.2d at 1290 (reversing conviction and remanding case for a new trial when "trial judge did not exercise the discretion granted him under the rule").

253. *See id.* at 427-28, 466 A.2d at 1289 (noting that "the trial judge did not properly exercise the discretion given him" when he "adopted a hard and fast rule" of procedure).

particular issue, he or she must apply that authority “depending on the facts and circumstances of each particular case.”²⁵⁴

Four years later, in *Maus v. State*,²⁵⁵ the Court of Appeals explicitly stated the importance of the active exercise of judicial discretion in the context of a judicial determination of sentencing for parole violations.²⁵⁶ The *Maus* court stressed that “[w]hen a court must exercise discretion, failure to do so is error, and ordinarily requires reversal.”²⁵⁷

An abuse of judicial discretion is considered harmless only if the reviewing court can establish beyond a reasonable doubt that the error did not influence the verdict.²⁵⁸ In *Dempsey v. State*,²⁵⁹ the Court of Appeals stated that it was “unable to conclude” that a trial judge’s improper comment to the jury that a confession was entirely voluntary did not so influence the verdict.²⁶⁰ Therefore the court reversed the guilty verdicts and remanded the case for a new trial.²⁶¹ In contrast, in *Rubin v. State*²⁶² the Court of Appeals found that a trial court’s decision to admit testimony that should have been excluded as privileged constituted harmless error because “the evidence of guilt was overwhelming.”²⁶³

b. Offering Jury Instructions Under Maryland Rule 4-325.— Maryland Rule 4-325 guides judges in deciding when jury instructions should be given.²⁶⁴ Rule 4-325(c) states, “The court may, and at the

254. *Id.* at 428, 466 A.2d at 1289 (criticizing a judge’s rule of denying a continuance in order to obtain additional evidence to any party in violation of a particular discovery rule when that rule “provides the trial judge with authority to fashion a sanction other than exclusion”).

255. 311 Md. 85, 532 A.2d 1066 (1987).

256. *See id.* at 108, 532 A.2d at 1077 (observing that, in revoking probation, the judge had discretion to consider the mitigating circumstance that the defendant had spent time in a drug rehabilitation facility under circumstances similar to incarceration).

257. *Id.*

258. *See Dempsey v. State*, 277 Md. 134, 150, 355 A.2d 455, 463 (1976) (stating that “[t]he burden of ‘demonstrat[ing], beyond a reasonable doubt, that such error did not contribute to the conviction,’ is upon the beneficiary of the error” (quoting *Dorsey v. State*, 276 Md. 638, 659, 350 A.2d 665, 678 (1976))); *see also Dorsey*, 276 Md. at 659, 350 A.2d at 678 (noting that “when an appellant, in a criminal case, establishes error, unless a reviewing court . . . is able to declare a belief, beyond a reasonable doubt, that the error in no way influenced the verdict, such error cannot be deemed ‘harmless’ and a reversal is mandated”).

259. 277 Md. 134, 355 A.2d 455 (1976).

260. *Id.* at 154, 355 A.2d at 465.

261. *Id.*, 355 A.2d at 465-66.

262. 325 Md. 552, 602 A.2d 677 (1992).

263. *Id.* at 578, 602 A.2d at 690.

264. MD. RULE 4-325.

request of any party shall, instruct the jury as to the applicable law and the extent to which the instructions are binding."²⁶⁵ If a judge fails to do so, she commits an abuse of discretion.²⁶⁶ Significantly, subsection (c) establishes that "[t]he court need not grant a requested instruction if the matter is fairly covered by instructions actually given."²⁶⁷ Maryland courts have debated the implications of this rule.

(1) *Instructions to the Jury on the Applicable Law.*—In *Robinson v. State*,²⁶⁸ the Court of Appeals noted that the judicial obligation to instruct the jury on the relevant law necessarily entails consideration of the particular circumstances of the case.²⁶⁹ In *Robinson*, the defendant argued that the trial judge erred by giving a "missing witness" instruction, *i.e.*, by informing the jury that the defendant's failure to call an allegedly exculpatory witness allowed the jury to infer that the witness would actually have testified unfavorably.²⁷⁰

The Court of Appeals noted that the witness's "existence and his involvement in this case were not demonstrated by any evidence other than the testimony of the defendant," and that therefore, "a fair inference from the unexplained failure to produce [the witness was] that [the witness] was not involved at all" and would not be able to exculpate the defendant.²⁷¹ The Court of Appeals held that there was no abuse of discretion in giving the "missing witness" instruction because the facts presented were sufficient to support the trial judge's jury instruction.²⁷²

(2) *Inappropriate Commentary on Facts in Instructions.*—If an instruction improperly comments on the facts in a case, that instruction may constitute reversible error.²⁷³ Because of the authoritative

265. MD. RULE 4-325(c).

266. *Cf. Rubin*, 325 Md. at 585, 602 A.2d at 693 (noting that a "court, when properly requested to do so, is obliged to instruct on the legal issues generated by the evidence").

267. MD. RULE 4-325(c); *see Dean v. State*, 325 Md. 230, 239-40, 600 A.2d 409, 413 (1992) (holding that "the trial court did not abuse its discretion in refusing to instruct the jury on the crime of assault with intent to disfigure" when the instruction was not required by the evidence in the case and when it was covered by other instructions given to the jury).

268. 315 Md. 309, 554 A.2d 395 (1989).

269. *See id.* at 319, 554 A.2d at 400 (noting that "the underlying facts [in the case] were sufficient to permit the unfavorable inference, and the trial judge did not abuse his discretion in giving the instruction").

270. *Id.* at 312, 554 A.2d at 396.

271. *Id.* at 317, 554 A.2d at 399.

272. *Id.* at 319, 554 A.2d at 400.

273. *See Gore v. State*, 309 Md. 203, 214, 522 A.2d 1338, 1343 (1987) (reversing a conviction on the ground that a disputed judicial remark was "an indirect comment on the general weight of the evidence as to each count and outside the permissible scope of comment").

position of trial judges, the Court of Appeals has been reluctant to conclude that an improper instruction will not influence a verdict.²⁷⁴

In *Gore v. State*, the Court of Appeals reversed a conviction because a judge attempted to explain certain principles of law to the jury in response to what the trial judge believed to be an inappropriate statement in the defense attorney's closing argument.²⁷⁵ Although the Court of Appeals recognized that the trial judge probably intended only to explain the concept of legally sufficient evidence to the jury, the court concluded that the judge's remarks were "an indirect comment on the general weight of the evidence as to each count and outside the permissible scope of comment."²⁷⁶

(3) *Omission of Jury Instructions*.—The significance of an omitted jury instruction varies with the specific circumstances of a case. Maryland courts assume that juries can and will follow instructions given to them, even if the instructions require them to disregard particularly prejudicial testimony.²⁷⁷ Accordingly, if the omission of the instruction means that erroneously admitted evidence will be considered by the jury, or that relevant evidence will be disregarded, the omission may be improper.²⁷⁸

In *Smith v. State*, the Court of Appeals noted that a defendant is entitled, upon request, to an alibi defense instruction whenever "the evidence in a criminal case generates the issue of alibi," as long as the matter is not covered by other instructions.²⁷⁹ The *Smith* court found that the defendant's uncorroborated testimony that he was out of state at the time of the crime was sufficient to raise the alibi issue, and

274. See *Dempsey v. State*, 277 Md. 134, 149, 355 A.2d 455, 463 (1976) (remarking that because of their "high and authoritative position[s]," trial judges ought to be "exceedingly careful" in their remarks during trial, "and should carefully refrain, either directly or indirectly, from giving expression to an opinion upon the existence or not of any fact, which should be left to the finding of the jury" (quoting *Elmer v. State*, 239 Md. 1, 10-11, 209 A.2d 776, 782 (1965))).

275. *Gore*, 309 Md. at 211-12, 522 A.2d at 1342 (holding improper the trial judge's instruction that he must deny a motion for judgment of acquittal if he believes that there is legally sufficient evidence to sustain a conviction). In that case, the trial judge corrected defense counsel's statement to the jury that there was "insufficient testimony" on a particular point by informing the jury that "the counts [charged] could never go to you if there were not evidence sufficient under the law; whether you believe it . . . is for you, the Jury, to decide." *Id.* at 204-05, 522 A.2d at 1338.

276. *Id.* at 214, 522 A.2d at 1343.

277. See *Dennison v. State*, 87 Md. App. 749, 760, 591 A.2d 568, 573 (1991) ("It is generally held that the jury can and will follow curative instructions.").

278. See *Smith v. State*, 302 Md. 175, 177, 486 A.2d 196, 196 (1985) (holding that "the trial court's refusal to instruct the jury on alibi constituted [reversible] error").

279. *Id.* at 180, 486 A.2d at 198.

that the trial court's refusal to instruct the jury on this issue was therefore improper.²⁸⁰

However, in *Rubin v. State*,²⁸¹ the Court of Appeals held that even if a particular instruction seemed to be required at the time it was requested, a judge's failure to give it was harmless error when the prosecutor did not make the expected argument that the instruction was intended to address.²⁸² A failure to give a particular jury instruction may constitute harmless error if the reviewing court can find beyond a reasonable doubt that its omission did not prejudice the losing party.²⁸³

(4) *Proposed Instructions Fairly Covered by Instructions Given.*—Rule 4-325(c) does not require that a proposed instruction be offered if that instruction is "fairly covered" by other instructions.²⁸⁴ Maryland courts have considered the application of this aspect of the rule in a number of contexts.

In *England & Edwards v. State*,²⁸⁵ the Court of Appeals held that an instruction relating to the possibility of error in eyewitness testimony may be "fairly covered" by a general instruction which states that, among other things, the defendant "'is entitled to every inference in his favor which can be reasonably drawn from the evidence.'"²⁸⁶ The court held that the trial judge therefore committed no error in refusing to give the eyewitness instruction.²⁸⁷

Similarly, in *Henry v. State*,²⁸⁸ the Court of Appeals held that certain proposed instructions in a death penalty sentencing were covered by the instructions given.²⁸⁹ In that case, a trial judge's general expla-

280. *Id.* at 183, 486 A.2d at 200.

281. 325 Md. 552, 602 A.2d 677 (1992).

282. *Id.* at 585-86, 602 A.2d at 693.

283. *See id.* (concluding that no prejudice resulted because the prosecutor never made the argument addressed by the omitted instruction).

284. MD. RULE 4-325(c).

285. 274 Md. 264, 334 A.2d 98 (1975).

286. *Id.* at 274-75, 334 A.2d at 104 (quoting the jury instructions of the trial court). In this case, the defendant requested a specific instruction as to "the possibility of human error or mistakes" in eyewitness identifications. *Id.* at 274, 334 A.2d at 104. While the instructions the court gave noted that the identification of an accused person by a single eyewitness may be enough for conviction, it also stated that "[w]here two inferences may be drawn from the same set of facts, one consistent with guilt and one consistent with innocence, the defendant is entitled to the inference which is consistent with innocence." *Id.* at 275, 334 A.2d at 104 (quoting the jury instructions of the trial court).

287. *See id.* at 276, 334 A.2d at 105 (stating that "where the point of law embodied in the requested instruction is fairly covered in the instructions actually given, no error is committed by the refusal to grant the requested instruction" (citations omitted)).

288. 324 Md. 204, 596 A.2d 1024 (1991).

289. *Id.* at 251, 596 A.2d at 1048.

nation of the role of mitigating circumstances in a death penalty case appropriately covered a requested instruction specifying that "a single mitigating circumstance is sufficient to justify a life sentence."²⁹⁰

c. *The Appropriateness of Jury Instructions on Eyewitness Identification.*—In *Branch v. State*,²⁹¹ the Court of Appeals concluded that eyewitness testimony is sufficiently credible to serve as the sole basis of a conviction.²⁹² The court did not discuss in that case the issue of whether a trial judge must give a cautionary jury instruction on eyewitness identification. In *England & Edwards v. State*,²⁹³ the court upheld the trial judge's decision to refuse a request for such a cautionary instruction.²⁹⁴ The court found, however, that the requested identification was fairly covered by other instructions given to the jury.²⁹⁵ Before *Gunning*, therefore, the question of when, if ever, a jury instruction on eyewitness identification must be given was unanswered in Maryland.²⁹⁶

Other courts have reached varying conclusions as to when, if ever, such an instruction must be given. In *United States v. Telfaire*,²⁹⁷ the court held that the trial judge did not abuse his discretion in sending the case to the jury when only one witness, the robbery victim, identified the defendant as his assailant.²⁹⁸ While acknowledging "the traditional recognition that identification testimony presents special problems of reliability,"²⁹⁹ the court held that the identification at issue in *Telfaire* did not present "special difficulties" requiring an instruction dealing with eyewitness testimony.³⁰⁰ The eyewitness-robbery victim in *Telfaire* had "adequate opportunity to observe" and also "spontaneous[ly]" identified the defendant.³⁰¹ However, the court appended a model instruction to its opinion and wrote that

290. *Id.* at 248-50, 596 A.2d at 1046-47.

291. 305 Md. 177, 502 A.2d 496 (1986).

292. *See id.* at 183, 502 A.2d at 499 ("Identification by the victim is ample evidence to sustain a conviction." (quoting *Walters v. State*, 242 Md. 235, 237-38, 218 A.2d 678, 680 (1966))).

293. 274 Md. 264, 334 A.2d 98 (1975).

294. *See id.* at 276, 334 A.2d at 105.

295. *See id.* at 274-76, 334 A.2d at 104-05.

296. *Cf. Gunning*, 347 Md. at 341, 701 A.2d at 378 (noting that "[t]he appropriateness of such an [eyewitness testimony] instruction is generally unsettled among the various jurisdictions").

297. 469 F.2d 552 (D.C. Cir. 1972) (per curiam).

298. *Id.* at 554 & n.4.

299. *Id.* at 555.

300. *Id.* at 556.

301. *Id.*

"failure to use this model . . . would constitute a risk in future cases that should not be ignored."³⁰²

The *Telfaire* model instruction listed detailed factors that a jury should consider in determining the reliability of eyewitness testimony.³⁰³ These factors included the witness's opportunity to observe the events described, the strength of the witness's recollection, occasions when the witness failed to identify the defendant, and the credibility of the identification witness.³⁰⁴

In *United States v. Holley*,³⁰⁵ the Court of Appeals for the Fourth Circuit held that when a criminal case contains only eyewitness testimony as evidence of identification, the *Telfaire* instruction should be given, with modifications appropriate to the case.³⁰⁶ The court emphasized that it adopted the *Telfaire* rule only for cases involving uncorroborated eyewitness testimony.³⁰⁷ In *Holley*, only a single eyewitness identification connected the defendant to the bank robbery with which he was charged.³⁰⁸ The court noted that it would view with "grave concern" a trial judge's failure to give the *Telfaire* instruction or its equivalent.³⁰⁹

In *United States v. Brooks*,³¹⁰ the Fourth Circuit clarified its holding in *Holley*, noting that the *Telfaire* instruction is necessary only when there are "special difficulties" with the identification.³¹¹ The *Brooks* court noted that other jurisdictions have "strongly urged" that the instruction be given in cases in which identification is uncertain, but have refused to find that the omission of the instruction always constitutes reversible error.³¹² Thus, the court concluded that if the evidence in support of a witness's identification is "overwhelming," a

302. *Id.* at 557.

303. *See id.* app. at 558-59 (appending the model instruction to the text of the opinion).

304. *Id.*

305. 502 F.2d 273 (4th Cir. 1974).

306. *See id.* at 275 ("In *Telfaire* the District of Columbia Circuit adopted generally for judges within the district a model instruction . . . permitting variation and adaptation to suit the proof and contentions of a particular case. We now do likewise as to the district judges in this circuit.").

307. *Id.* at 275.

308. *Id.* at 274.

309. *Id.* at 275.

310. 928 F.2d 1403 (4th Cir. 1991).

311. *Id.* at 1406 (quoting *United States v. Telfaire*, 469 F.2d 552, 556 (1972) (per curiam)).

312. *See id.* (emphasizing that "*Telfaire* does not purport to compel in every case where there is significant identification testimony an extended instruction on the reliability of identification testimony").

313. *Id.* at 1407 (quoting *United States v. Thoma*, 713 F.2d 604, 607 (10th Cir. 1983)).

criminal defendant is not prejudiced by the absence of the instruction, and reversal is not required.³¹⁴

Other courts have expressly rejected the use of a cautionary instruction on eyewitness testimony. In *Conley v. State*,³¹⁵ the Supreme Court of Arkansas held that the *Telfaire* instruction improperly commented on the evidence in the case.³¹⁶ That court further held that the instruction impermissibly dealt with the weight a jury should give identification evidence.³¹⁷

In *Hopkins v. State*,³¹⁸ the Supreme Court of Indiana determined that the *Telfaire* instruction impermissibly singled out eyewitness testimony.³¹⁹ The court noted that under Indiana law, no one witness's testimony should be emphasized to the jury in jury instructions.³²⁰

3. *The Court's Reasoning.*—In *Gunning v. State*, the Court of Appeals determined that, while an instruction on eyewitness identification is not mandatory, a trial judge must exercise his or her discretion in considering whether the instruction should be given based on the facts of the case and the other instructions offered.³²¹ The court held that the trial judge in the present case failed to exercise such discretion, thereby committing reversible error.³²²

The court first addressed whether a trial judge is required to give an instruction on eyewitness identification.³²³ The court observed that courts in different jurisdictions have not reached a consensus as to when such an instruction is mandatory or indeed whether it is ever appropriate.³²⁴

314. *Id.* at 1409.

315. 607 S.W.2d 328 (Ark. 1980).

316. *See id.* at 330 (stating that the trial court was correct to reject the proffered *Telfaire* instruction because "the instruction contains comments on the evidence," and noting that "[t]his is a practice permitted in federal court but not in Arkansas").

317. *See id.* (stating that the instruction was further improper because it "concerned the weight to be given to identification testimony, a subject not covered by the Arkansas Model Jury Instructions").

318. 582 N.E.2d 345 (Ind. 1991).

319. *See id.* at 353 (noting that "Indiana law, unlike federal law . . . is distinctly biased against jury instructions which single out eyewitness identification testimony").

320. *See id.* (stating that "a trial court should not give instructions which tend to emphasize the testimony of any single witness").

321. *See Gunning*, 347 Md. at 348, 701 A.2d at 381-82 (finding that the trial judge must make preliminary determinations regarding the necessity of the requested instruction).

322. *Id.* at 354-55, 701 A.2d at 384-85.

323. *See id.* at 340-41, 701 A.2d at 377-78 (summarizing the initial arguments presented by the parties).

324. *See id.* at 341, 701 A.2d at 378 ("The appropriateness of such an instruction is generally unsettled among the various jurisdictions.").

The majority began its analysis with an examination of cases applying the "*Telfaire* approach," which requires the instruction to be given if the reliability of an identification is seriously challenged.³²⁵ The court noted that courts adopting the *Telfaire* view have done so because of the tendencies of juries to overrate the reliability of eyewitness testimony.³²⁶ The Court of Appeals noted that the goal of the *Telfaire* instruction is to ensure that the jury considers "the totality of the circumstances [under which the identification [is] made]."³²⁷

The court contrasted these cases with holdings from other jurisdictions that have rejected the use of eyewitness identification instructions.³²⁸ Some of these courts have found that instructions on eyewitness identification constitute per se improper judicial commentary on evidence.³²⁹ Others have suggested that offering the instruction improperly emphasizes eyewitness testimony.

Concluding that neither the *Telfaire* approach nor an absolute prohibition was satisfactory, the court adopted a rule that placed the decision whether to offer an eyewitness identification instruction "within the sound discretion of the trial court."³³⁰ The Court of Appeals noted that this "flexible approach" of leaving eyewitness identification instruction to the trial court's discretion has several benefits.³³¹ It prevents the appellate court from imposing rigid requirements on trial courts under the threat of automatic reversal, avoids issuance of the instruction when the facts of the case indicate the reliability of the identification, and permits the decision on instructions to be made by the trial judge, who is best able to evaluate its usefulness.³³²

325. *Id.*; see *supra* notes 303-304 and accompanying text (discussing when the *Telfaire* instruction should be used); see also *United States v. Telfaire*, 469 F.2d 552, app. 558-59 (providing the full text of the instruction).

326. See *Gunning*, 347 Md. at 343, 701 A.2d at 379 ("Proponents of the *Telfaire* approach emphasize that eyewitness identifications are perhaps less reliable than the average juror appreciates, and consider a cautionary instruction necessary to minimize the risk of erroneous convictions.").

327. *Id.* (first alteration in original) (quoting *United States v. Holley*, 502 F.2d 273, 275 (4th Cir. 1974)).

328. *Id.* at 344-45, 701 A.2d at 380 (citing *Conley v. State*, 607 S.W.2d 328 (Ark. 1980); *Hopkins v. State*, 582 N.E.2d 345 (Ind. 1991); *State v. Classen*, 571 P.2d 527 (Or. App. 1977), *rev'd on other grounds*, 590 P.2d 1198 (Or. 1979)).

329. See *id.* at 344, 701 A.2d at 380 (noting that some "jurisdictions have expressly rejected *Telfaire*-like instructions . . . based on the conclusion that eyewitness identification instructions amount to an impermissible judicial comment on the evidence").

330. *Id.* at 345, 701 A.2d at 380.

331. *Id.* at 345-46, 701 A.2d at 380-81 (quoting *United States v. Brooks*, 928 F.2d 1403, 1408 (4th Cir. 1991)).

332. See *id.* (quoting *Brooks*, 928 F.2d at 1408).

Next, the court considered whether the language of Maryland Rule 4-325(c) prohibited or required an eyewitness identification instruction.³³³ The court rejected the State's argument that the identification instruction "goes beyond an explanation of the substantive law" and thus improperly discusses particular factors that the jury should determine itself in weighing testimony on identification.³³⁴ Instead, the court compared such an instruction to one that advises the jury to determine whether a proffered alibi covered the entire time period of the crime.³³⁵ Such an "evidentiary instruction" is permitted under Maryland law as part of an instruction on applicable law.³³⁶

Having held that offering an instruction on eyewitness testimony does not violate Rule 4-325, the court further considered whether the rule requires the giving of such an instruction.³³⁷ Although the court found that the proposed instruction could constitute a proper explanation of law, it noted that a requested jury instruction should only be given if the trial judge finds that the evidence presented at trial "suggests the need" for the instruction.³³⁸ The court clarified that Rule 4-325(c) is not "absolute"; an instruction correctly stating the law must also be appropriate to the facts of the case and relate to issues not covered in other instructions in order to be mandatory.³³⁹ The court discussed several factors to consider in determining whether the evidence suggests the need for the instruction: the certainty of the identification, the extent to which the identification is at issue, and the degree to which other evidence corroborates the identification.³⁴⁰ Moreover, as stated in Maryland Rule 4-325(c), the requested instruction is unnecessary if the point made by the instruction is "fairly cover[ed]" by other instructions given to the jury.³⁴¹ Finally, if a trial judge decides that the evidence in a case justifies an instruction on eyewitness identification, he or she is not obligated to use the exact

333. *Id.* at 347, 701 Md. at 381.

334. *Id.*

335. *Id.* (citing *Smith v. State*, 302 Md. 175, 178, 486 A.2d 196, 198 (1985)).

336. *See id.* (noting that the evidentiary value of the alibi instruction does not remove it from the category of "applicable law").

337. *Id.* at 348, 701 A.2d at 381-82.

338. *Id.*, 701 A.2d at 382.

339. *Id.* at 347-48, 701 A.2d at 381-82.

340. *Id.* at 348, 701 A.2d at 381.

341. MD. RULE 4-325(c). In discussing this point, the Court of Appeals cited *Jackson v. State*, 69 Md. App. 645, 519 A.2d 751 (1987), in which the Court of Special Appeals held that the identification issue could be addressed sufficiently by an instruction that directed the jury "to consider the testimony of all the witnesses concerning identification and give the testimony such weight as the jury thought should be given it." *Gunning*, 347 Md. at 349, 701 A.2d at 382 (quoting *Jackson*, 69 Md. App. at 660, 519 A.2d at 758).

language proposed by the defendant's attorney.³⁴² The judge may select his or her own wording, provided that the instruction is "accurate and 'fairly covers' the requested instruction."³⁴³

After concluding that the decision to give an eyewitness instruction falls within a trial judge's discretion, the Court of Appeals examined whether the judge presiding over *Gunning* and *Harris* had properly exercised this discretion.³⁴⁴ The court began with the premise that a judge is required to exercise his or her discretion whenever confronted with a matter that falls within it.³⁴⁵ Failure to do so may constitute error, which "'ordinarily requires reversal.'"³⁴⁶ The court emphasized that the decision made in exercising discretion must take into account the peculiar circumstances of the case at hand.³⁴⁷ Therefore, a judge may not decide discretionary issues by adopting a general rule to be applied to all cases.³⁴⁸

In evaluating the actions of the trial judge in *Gunning* and *Harris*, the court held that he erred in failing to make an "individualized determination" that the instruction was unnecessary in each case.³⁴⁹ Although the judge believed that the instruction was improper because it was a comment on an issue of fact,³⁵⁰ the Court of Appeals rejected the judge's "unyielding rule"³⁵¹ and stated that the judge should have at least *considered* the eyewitness identification instruction in both *Gunning* and *Harris*.³⁵² Therefore, the court vacated both convictions and remanded the cases to the Circuit Court for Baltimore City for new trials.³⁵³

342. *Gunning*, 347 Md. at 350, 701 A.2d at 382-83.

343. *Id.*, 701 A.2d at 383 (quoting *King v. State*, 36 Md. App. 124, 373 A.2d 292 (1977); *Nelson v. State*, 5 Md. App. 109, 245 A.2d 606 (1968)).

344. *Id.* at 351, 701 A.2d at 383.

345. *See id.* ("It is well settled that a trial judge who encounters a matter that falls within the realm of judicial discretion *must* exercise his or her discretion in ruling on the matter." (citing *Colter v. State*, 297 Md. 423, 426, 466 A.2d 1286, 1288 (1983))).

346. *Id.* (quoting *Maus v. State*, 311 Md. 85, 108, 532 A.2d 1066, 1077 (1987)).

347. *See id.* at 352, 701 A.2d at 383-84 ("A proper exercise of discretion involves consideration of the particular circumstances of each case.").

348. *See id.*, 701 A.2d at 384 (characterizing the use of "uniform" rules in discretionary matters as error).

349. *See id.* at 351, 353, 701 A.2d at 383, 384 ("[W]e hold that the judge's unyielding adherence to this predetermined position amounts to . . . a failure to properly exercise discretion.").

350. *Id.*

351. *Id.* at 355, 701 A.2d at 385.

352. *Id.* at 351, 701 A.2d at 383.

353. *Id.* at 355, 701 A.2d at 385. In *Gunning's* case, which, unlike *Harris's*, had been affirmed by the Court of Special Appeals, the Court of Appeals also reversed the intermediate court's decision. *Id.*

Although the majority refused to establish rigid rules in determining when the eyewitness instruction should be given,³⁵⁴ it mentioned several factors that might guide a trial judge in exercising his or her discretion.³⁵⁵ The court stated that a request for the eyewitness identification instruction should be given “careful consideration” when “uncorroborated eyewitness testimony is a critical element of the State’s case and doubts have been raised about the reliability of that testimony.”³⁵⁶ Conversely, the court noted that the instruction will be less useful when there is corroboration of the defendant’s role in the act, when there are no reasonable doubts about the accuracy of the identification, or when there are other instructions given to the jury that adequately cover the topic.³⁵⁷

Judges Raker and Wilner wrote an opinion concurring in part and dissenting in part. While they agreed that the eyewitness instruction is not inherently improper,³⁵⁸ they added that such an instruction might be “required” in some cases.³⁵⁹ They emphasized, however, that the extent to which a defendant was actually prejudiced by judicial error must be taken into account by a reviewing court.³⁶⁰ The judges concurred in the holding that the trial judge’s failure to exercise his discretion in Gunning’s case prejudiced that defendant, and that a new trial was therefore necessary.³⁶¹ In Harris’s case, however, the judges concluded that the trial judge’s error was “in no way prejudicial to the defendant” and that Harris’s conviction should be upheld.³⁶²

354. *See id.* at 345, 701 A.2d at 380 (concurring “with those courts that have declined to adopt . . . rigid rules on the appropriateness of an identified instruction”).

355. *Id.* at 354, 701 A.2d at 385.

356. *Id.*

357. *Id.*

358. *See id.* at 355-56, 701 A.2d at 385-86 (Raker, J. and Wilner, J., concurring in part and dissenting in part) (outlining their agreement with the majority).

359. *Id.* at 356, 701 A.2d at 385. The dissent suggested that “there really is no reason not to give the instruction” when “(1) criminal agency is in dispute, (2) the State’s case . . . rests, to any significant degree, on eyewitness identification evidence, and (3) . . . the reliability of the identification is significantly challenged by the defendant.” *Id.* at 362, 701 A.2d at 389.

360. *See id.* at 359, 701 A.2d at 387 (examining the prejudicial effect of the trial judge’s errors).

361. *Id.* at 358, 701 A.2d at 386-87. The judges noted that in Gunning’s case, the “evidence presented a very clear conflict, which necessarily put into issue the accuracy of [the witness’s] identification.” *Id.* at 361, 701 A.2d at 388.

362. *Id.* at 359, 701 A.2d at 387. The judges reviewed the evidence offered in *Harris*, concluding that the jury had before it “a positive identification by a neutral eyewitness in a nearly perfect daylight setting, with no hint of suggestiveness and no evidence casting any doubt on [the witness’s] ability to observe what occurred and to report that observation

4. *Analysis*.—Although consistent with previous Maryland rulings on the importance of judicial discretion, the court's opinion in *Gunning* does not take into consideration the peculiar problems that accompany eyewitness testimony. In *Gunning*, the court emphasized that a trial judge should be free to tailor jury instructions to the case at hand.³⁶³ However, scientific evidence suggests that eyewitness identifications of strangers are both extremely unreliable and of strong significance to jurors.³⁶⁴ Therefore, it would not be unreasonable to find that a cautionary instruction is appropriate in many cases turning on such testimony. The Court of Appeals should have established clear and relevant factors that trial judges would be required to consider in deciding whether or not to offer eyewitness testimony instructions. Such an inquiry would not excessively limit trial judges' discretion over jury instructions.

a. *The Exercise of Judicial Discretion over Eyewitness Identification Instructions*.—As the court noted in *Gunning*, few jurisdictions agree on the correct treatment of eyewitness testimony in jury instructions.³⁶⁵ Placing the decision to give an instruction on eyewitness identification within a judge's discretion is consistent with holdings from other jurisdictions.³⁶⁶ Moreover, the court's description of judicial discretion comports with holdings from other Maryland cases,

accurately." *Id.* The judges also noted that the instructions given to the jury in *Harris* may have "fairly covered" the eyewitness identification issue. *Id.*

363. *Gunning*, 347 Md. at 346-47, 701 A.2d at 381 (noting that the decision to give a cautionary instruction "must be decided upon the particular facts of the case" (quoting *State v. Guster*, 421 N.E.2d 157, 161 (Ohio 1981))).

364. *See infra* notes 369-370 and accompanying text (discussing the persuasive nature of eyewitness identifications).

365. *See Gunning*, 347 Md. at 341, 701 A.2d at 378 (noting that "[t]he appropriateness of such an instruction is generally unsettled among the various jurisdictions"); *see, e.g.*, *Conley v. State*, 607 S.W.2d 328, 330 (Ark. 1980) (rejecting the *Telfaire* instruction as an improper comment on the evidence); *Hopkins v. State*, 582 N.E.2d 345, 353 (Ind. 1991) (holding that a *Telfaire* instruction was unnecessary because Indiana law "'is distinctly biased against jury instructions which single out eyewitness identification testimony'" (quoting *Brown v. State*, 468 N.E.2d 841, 843 (Ind. 1984))); *State v. Warren*, 635 P.2d 1236, 1244 (Kan. 1981) (concluding that a cautionary instruction should be given in any criminal case "in which eyewitness identification is a critical part of the prosecution's case and there is a serious question about the reliability of the identification"); *State v. Long*, 721 P.2d 483, 492 (Utah 1986) (stating that, in view of the problems of eyewitness perception, trial courts must give a cautionary instruction "whenever eyewitness identification is a central issue in a case and such an instruction is requested by the defense").

366. *See, e.g.*, *State v. Dyle*, 899 S.W.2d 607, 610-11 (Tenn. 1995) (listing jurisdictions which "leave the decision to the discretion of the trial court").

which state that if a judge has discretion to decide a particular issue, he or she must exercise that discretion.³⁶⁷

However, the perceptual problems of eyewitness identification of strangers are sufficiently serious to justify requiring an instruction in some cases.³⁶⁸ This is particularly true in light of the extremely persuasive nature of eyewitness identifications.³⁶⁹ The Court of Appeals for the Second Circuit has commented that “doubts over the strength of the evidence of a defendant’s guilt may be resolved on the basis of the eyewitness’ seeming certainty when he points to the defendant and exclaims with conviction that veils all doubt, ‘[T]hat’s the man!’”³⁷⁰

In a number of jurisdictions, when certain touchstones are present, an eyewitness instruction must be given. In *United States v. Brooks*,³⁷¹ the Fourth Circuit held that the *Telfaire* instruction should be given when there is a strong chance of misidentification, “uncertainty or qualification in the identification testimony,” or other “special difficulties.”³⁷² Similarly, the Supreme Court of Utah has stated that trial judges should give cautionary instruction “whenever eyewitness identification is a central issue in a case and such an instruction is requested by the defense.”³⁷³ Even the *Gunning* court suggested that when uncorroborated eyewitness testimony is a vital element of the State’s case and when doubts have been raised about the reliability of the identification testimony, the instruction would be particularly appropriate.³⁷⁴ A trial judge bound by these considerations in weighing the necessity for the instruction is required to examine whether such

367. See, e.g., *Colter v. State*, 297 Md. 423, 426, 466 A.2d 1286, 1288 (1983) (noting that “when a court has discretion to act, it must exercise that discretion”).

368. See Gary L. Wells et al., *Accuracy, Confidence, and Juror Perceptions in Eyewitness Identification*, 64 J. APPLIED PSYCH. 440, 440 (1979) (stating that “staged-crime research indicates that eyewitness identifications are often unreliable”); cf. *Dyle*, 899 S.W.2d at 609 (citing scholarly opinion for the proposition that “eyewitness testimony poses special problems in the administration of justice”).

369. See Cindy J. O’Hagan, *When Seeing is Not Believing: The Case for Eyewitness Expert Testimony*, 81 GEO. L.J. 741, 742 (1993) (noting that “despite [the] risk [that human memory processes will err], juries tend to blindly rely on eyewitness identifications”).

370. *Kampshoff v. Smith*, 698 F.2d 581, 585 (2d Cir. 1983) (alteration in original) (quoting *United States v. Wade*, 388 U.S. 218, 235-36 (1967)). In *Gunning*, the court downplayed these issues, noting only that an instruction may be useful in some cases “[a]lthough jurors might know generally that a witness’s perception . . . is not always reliable and that memory is not infallible.” *Gunning*, 347 Md. at 350, 701 A.2d at 383.

371. 928 F.2d 1403 (4th Cir. 1991).

372. *Id.* at 1409 (citation omitted).

373. *State v. Long*, 721 P.2d 483, 492 (Utah 1986).

374. See *Gunning*, 347 Md. at 354, 701 A.2d at 385 (noting that when these circumstances are present, the instruction should be given “careful consideration”).

touchstones exist in the specific case at hand. Thus, requiring an instruction when these conditions are present need not defeat the goal of Rule 4-325 that the jury instructions in a case be properly tailored to the particular facts and circumstances of that case.³⁷⁵ This goal was central to the court's analysis in *Gunning*.³⁷⁶

A rule requiring an eyewitness identification instruction in particular circumstances would not constitute an unwarranted intrusion into a judge's discretion. Under such a rule, a trial court would still be required to exercise its discretion to determine if these circumstances were present in a particular case.³⁷⁷ This process would be comparable to that established by the Court of Appeals for the giving of alibi instructions. The Court of Appeals, in *Smith v. State*,³⁷⁸ held that when the "issue of alibi" is "generat[ed]" in a case, the trial judge must offer an instruction particularly addressing that issue.³⁷⁹ The court offered specific guidance to trial judges on when that issue was generated.³⁸⁰ The factors noted in *Telfaire* or other cases could similarly guide trial judges in determining when eyewitness instructions must be given. In *Smith*, there was no suggestion that such a guideline represented an unwarranted interference with trial judges' discretion over jury instructions.³⁸¹

Requiring eyewitness instructions when the eyewitness testimony in a case is uncorroborated, "critical" to the State's case, and has been met with questions as to its reliability³⁸² would constitute a reasonably minor incursion into the discretion of trial judges while comporting with holdings in Maryland and other jurisdictions on the treatment of eyewitness testimony. Such a rule would continue to require judicial discretion to avoid unnecessary instructions. The Court of Special Ap-

375. See *Rubin v. State*, 325 Md. 552, 585, 602 A.2d 677, 693 (1992) (noting that "[a] court . . . is obliged to instruct on the legal issues generated by the evidence" in a case).

376. See *Gunning*, 347 Md. at 346-47, 701 A.2d at 381 (stating that the determination of whether an eyewitness instruction should be given "cannot be directed by a general rule, but must be decided upon the particular facts of the case" (quoting *Ohio v. Guster*, 421 N.E.2d 157, 161 (Ohio 1981))).

377. See *Brooks*, 928 F.2d at 1407 (finding that "the *Telfaire* instruction . . . is compelled only where the evidence in the case" renders misidentification likely, a determination which must be made by the trial judge).

378. 302 Md. 175, 486 A.2d 196 (1985).

379. *Id.* at 180, 486 A.2d at 198.

380. See *id.* (noting that most jurisdictions hold that "the defendant's uncorroborated testimony . . . is sufficient to generate the issue").

381. See *id.* at 183, 486 A.2d at 200 (stating that "it is not the function of the trial judge to . . . select some cases in which to give the alibi instruction" (quoting *Hudson v. State*, 381 So. 2d 344, 346 (Fla. 1980))).

382. *Gunning*, 347 Md. at 354, 701 A.2d at 385.

peals, in a decision quoted with approval in *Gunning*,³⁸³ refused to require an instruction on eyewitness testimony unreliability when the instruction was “not particularly appropriate” to the facts of the case.³⁸⁴ Similarly, the Fourth Circuit noted that an eyewitness identification instruction was not needed when the witness making the identification was well acquainted with the defendant and the conditions of the encounter testified to were “adequate to permit easy recognition.”³⁸⁵ By only requiring eyewitness instructions when certain factors are met, there is little risk that unwarranted instructions will be mandated. Under such a procedure, the trial judge remains “in the best position to evaluate whether this charge is needed in the case before it.”³⁸⁶ However, the standards for that evaluation are sharpened to ensure that the finders of fact are better able to weigh the value of potentially scientifically unreliable evidence.³⁸⁷

Finally, where the factors noted by the court in *Gunning* are present, it is unlikely that an eyewitness instruction would be “fairly covered” by more general instructions on the burden of proof or the weighing of evidence. It is a recurring theme in Maryland jurisprudence that when offering jury instructions, a trial judge should have discretion to determine whether a proposed instruction is covered by other instructions given.³⁸⁸ In *England & Edwards v. State*,³⁸⁹ the Court of Appeals found that a proposed instruction on eyewitness testimony was properly covered by a general caution that the defendant was entitled “‘to every inference in his favor.’”³⁹⁰ However, the instructions proposed in that case were more general than either the proposed MICPEL instruction in *Gunning* or the *Telfaire* instruction

383. *Jackson v. State*, 69 Md. App. 645, 519 A.2d 751 (1987).

384. See *Gunning*, 347 Md. at 349-50, 701 A.2d at 382 (discussing the *Jackson* opinion); *Jackson*, 69 Md. App. at 661, 519 A.2d at 758-59 (finding “the trial judge committed no error in refusing to instruct the jury as requested”). In that case, the eyewitness-victim spent several hours with the individual identified before the crime occurred, and the identification was corroborated by other witnesses. *Id.* “This was not a case of a brief encounter under conditions of poor illumination.” *Id.*, 519 A.2d at 758. Thus, “[t]here was no suggestion in the evidence of any of the factors adversely affecting accuracy of identification that were stressed in the requested instruction.” *Id.*, 519 A.2d at 759.

385. *United States v. Brooks*, 928 F.2d 1403, 1408 (4th Cir. 1991).

386. *Gunning*, 347 Md. at 346, 701 A.2d at 381.

387. See *United States v. Telfaire*, 469 F.2d 552, 556 (D.C. Cir. 1972) (noting that when identification testimony presents “special difficulties,” a cautionary instruction increases the jury’s ability to “evaluate the reliability of the identification”).

388. See *Gunning*, 347 Md. at 348, 701 A.2d at 382 (noting that “Maryland law . . . is clear that a requested instruction need not be given where other instructions ‘fairly cover’ the subject matter of the requested instruction”).

389. 274 Md. 264, 334 A.2d 98 (1975).

390. *Id.* at 274-75, 334 A.2d at 104 (quoting the trial court’s jury instructions).

adopted by the Fourth Circuit.³⁹¹ As such, the *England & Edwards* instructions were unlikely to add to the jury's understanding of the scientific problems of particular types of eyewitness identification.³⁹²

While such a general instruction may be fairly covered by other instructions related to the burden of proof or the weight of evidence, an instruction such as the one in *Telfaire* directing the factfinder's attention to particular issues would not be covered by the broader instructions. Additionally, a blanket warning that eyewitness testimony should be "scrutinized with extreme care" is likely to add little to a jury's understanding of the particular issues that may be raised by the uncorroborated and challenged identification under adverse conditions for observing strangers.³⁹³ In contrast, mandating a more detailed instruction when a trial judge determines that particular factors are present in a case not only directly addresses the issues in a case, but also takes into account the potential scientific problems of the testimony considered.³⁹⁴

b. The Perceptual Problems of Eyewitness Identification of Strangers.—Many courts have noted the uncertainty of eyewitness identifications and the resultant dangers of mistaken identification.³⁹⁵ Justice Frankfurter commented:

391. See *id.* at 274, 334 A.2d at 104 (quoting the defendant's requested instruction). The instruction requested in *England & Edwards* contained only a general remark that "testimony tending to prove identity [should] be scrutinized with extreme care" and that the jury should consider "the possibility of human error" while deliberating. *Id.* The proposed MICPEL instruction in *Gunning*, on the other hand, advised the jury to consider certain specific factors in weighing the eyewitness identification, including "the witness'[s] opportunity to observe," the duration of the opportunity to observe, and "the witness'[s] state of mind." *Gunning*, 347 Md. at 336, 701 A.2d at 376 (alterations in original). Similarly, the *Telfaire* model instruction raises for the jury's consideration the questions of whether the witness had "the capacity and an adequate opportunity to observe the offender," whether the identification was the product of his or her "own recollection," and whether the witness may have been affected by external circumstances in his or her identification of the defendant. *Telfaire*, 469 F.2d app. at 558.

392. See *infra* notes 397-423 and accompanying text (discussing some of the scientific problems associated with eyewitness identifications).

393. See, e.g., *England & Edwards*, 274 Md. at 274, 334 A.2d at 104 (where the proposed instruction stated that "testimony tending to prove identity [should] be scrutinized with extreme care").

394. See *State v. Warren*, 635 P.2d 1236, 1244 (Kan. 1981) (stating that requiring a cautionary instruction when particular circumstances exist in a case properly provides "standards" to the jury "so that the credibility of eyewitness identification testimony can be intelligently and fairly weighed").

395. See, e.g., *United States v. Wade*, 388 U.S. 218, 228 (1967) ("The vagaries of eyewitness identification are well-known; the annals of criminal law are rife with instances of mistaken identification.").

What is the worth of identification testimony even when uncontradicted? The identification of strangers is proverbially untrustworthy. The hazards of such testimony are established by a formidable number of instances in the records of English and American trials. These instances are recent—not due to the brutalities of ancient criminal procedure.³⁹⁶

A number of studies have confirmed Justice Frankfurter's fear that eyewitness identification of strangers is of doubtful reliability.³⁹⁷ It has been suggested that rather than being a single event, the process of memory can be divided into three stages: acquisition, storage (or retention), and retrieval.³⁹⁸ At any point in these stages, external events or internal factors may distort the final memory.³⁹⁹ Recall accuracy of a crime may be affected by the duration of exposure to the event,⁴⁰⁰ unfamiliarity with the physical surroundings in which the event takes place,⁴⁰¹ intervening suggestive questioning,⁴⁰² the races

396. FELIX FRANKFURTER, *THE CASE OF SACCO AND VANZETTI* 30 (1927).

397. See O'Hagan, *supra* note 369, at 745. This author observes:

[A problem] unique to eyewitness identifications is the human memory process, which, contrary to popular belief, is a series of complex events. It is universally accepted that the memory process takes place in three stages: (1) perception of the event, (2) retention, and (3) retrieval of the stored information. Psychologists explain that information is transformed as it passes through each of these stages, and it can be distorted by internal and external factors that can eventually cause retrieval failure.

id. (citing ELIZABETH F. LOFTUS, *EYEWITNESS TESTIMONY* 22 (1979); A. DANIEL YARMEY, *THE PSYCHOLOGY OF EYEWITNESS TESTIMONY* 57 (1979); Hadyn D. Ellis, *Practical Aspects of Face Memory*, in *EYEWITNESS TESTIMONY* 12, 12-13 (Gary L. Wells & Elizabeth F. Loftus eds., 1984)).

398. Ellis, *supra* note 397, at 13.

399. O'Hagan, *supra* note 369, at 745.

400. Gary L. Wells, *Applied Eyewitness-Testimony Research: System Variables and Estimator Variables*, 36 J. PERSONALITY & SOCIAL PSYCH. 1546, 1549 (1978) (stating that "picture recognition is a monotonically increasing function of functional exposure time").

401. *Id.* (stating that "[l]ack of familiarity with the size and/or distance of surrounding objects can produce large distortions in estimates of the size, distance, and acceleration of the perceptual target").

402. Elizabeth F. Loftus, *Reconstructing Memory: The Incredible Eyewitness*, 15 JURIMETRICS J. 188, 188 (1975) (noting that "the questions asked about an event influence the way a witness 'remembers' what he saw").

of the viewer and the viewed,⁴⁰³ the complexity of the event,⁴⁰⁴ and in some circumstances the seriousness of the crime.⁴⁰⁵

At the same time, eyewitness identification is particularly likely to be believed by juries.⁴⁰⁶ It has been suggested that jurors dramatically overestimate the reliability of such testimony.⁴⁰⁷ In a simulated criminal trial arranged by one psychologist, eighteen percent of the "jurors" voted to convict a defendant when there were no eyewitnesses to the crime, but seventy-two percent voted to convict when a credible eyewitness was presented.⁴⁰⁸ Even when the eyewitness's powers of perception were discredited on cross-examination, sixty-eight percent voted for conviction.⁴⁰⁹ One study has suggested that "jurors' rate of belief [of eyewitness testimony] is around 80% irrespective of the actual rate of witness accuracy."⁴¹⁰

The problems of eyewitness identification are particularly acute when the witness makes an identification on the basis of a single brief encounter.⁴¹¹ This weakness in identification occurred in both the *Gunning* and *Harris* cases. The attackers were viewed for only a few moments by the respective eyewitnesses, Mr. Hoopes and Ms. Carponetto.⁴¹² As the dissent in *Gunning* pointed out, Ms. Carponetto was more sure of the details she reported than was Mr. Hoopes and

403. Sheri Lynn Johnson, *Cross-Racial Identification Errors in Criminal Cases*, 69 CORNELL L. REV. 934, 936 (1984) (noting that "psychologists have compiled empirical evidence that incontrovertibly demonstrates a substantially greater rate of error in cross-racial recognition of faces").

404. Wells, *supra* note 400, at 1549 (noting that "the complexity of an event can increase later recognizability").

405. *Id.* at 1548-49 (suggesting that "the relationship between crime seriousness and eyewitness accuracy may actually be curvilinear" although "it may be beyond the ethical and practical limits of social psychologists to demonstrate the kind of crime severity necessary to adequately test" this hypothesis).

406. See *State v. Long*, 721 P.2d 483, 492 (Utah 1986) (noting the "great weight jurors are likely to give eyewitness testimony").

407. *Id.* at 490 ("Perhaps it is precisely because jurors do not appreciate the fallibility of eyewitness testimony that they give such testimony great weight.").

408. Loftus, *supra* note 402, at 189.

409. See *id.* (noting that 68% voted for conviction when the eyewitness was "discredited" by the fact that the defense attorney showed that the eyewitness was not wearing glasses at the time of the event and had 20/400 vision).

410. Wells et al., *supra* note 368, at 447.

411. See O'Hagan, *supra* note 369, at 745 ("During the perception stage 'event factors,' such as exposure time, frequency, detail salience, and the degree of violence, may affect the initial perception.").

412. See *Gunning's Joint Record Extract* at 29-30, *Gunning v. State*, 347 Md. 332, 701 A.2d 374 (1997) (No. 132) (recording witness's testimony that the entire mugging incident took "two and a half, three minutes"); *Harris's Joint Record Extract*, Vol. I at 19, *Gunning v. State*, 347 Md. 332, 701 A.2d 374 (1997) (No. 132) (recording witness's testimony that she saw the attacker for "a minute, a minute and a half").

was more physically and emotionally removed from the event.⁴¹³ Nevertheless, both cases may have implicated the distorting factors noted above. It has been suggested that if such factors are present, the certainty of the witness may not be entirely relevant to the accuracy of the memory.⁴¹⁴

“Frequently perceived features are, in general, more likely to be permanently stored in memory than are rarely perceived features.”⁴¹⁵ Moreover, the basic problems of perception inherent in eyewitness testimony may be compounded by the necessary legal identification process, by which an eyewitness selects the face seen from a lineup or a photographic array.⁴¹⁶

Cognitive psychologists describe a process known as “pseudomemory,” in which individuals remember prototypical facial features rather than an entire face and therefore “recognize” a person who possesses those features even if they have never before seen that person.⁴¹⁷ Researchers attribute this effect to the different speeds at which the mind learns specific features and at which it learns relationships between features.⁴¹⁸ One test showed subjects a “prototype” face created from the predrawn facial characteristics included in an Identikit, used by police to create images of suspects described by witnesses.⁴¹⁹ Asked later to select the “prototype” face, subjects identified a face with features seventy-five percent, fifty percent, and twenty-five percent the same as features on the prototype far more confidently than they recognized the actual test face.⁴²⁰ The operation of pseudomemory may involve distinctly different types of brain

413. *Gunning*, 347 Md. at 359-60, 701 A.2d at 387-88 (Raker, J., and Wilner, J., concurring in part and dissenting in part) (comparing the facts of the two cases).

414. See ROBERT L. SOLSO, *COGNITIVE PSYCHOLOGY* 59 (5th ed. 1998) (noting that “[d]uring the reconstruction process similar memories may be mistaken for real memories”). The purpose of this Note is not to suggest that memories of traumatic events are inherently unreliable. As Loftus notes, “flashbulb memories,” including “[i]mages of such public events [as assassinations], and more private [traumatic] events . . . are said to persist with little subjectively experienced loss of clarity.” ELIZABETH F. LOFTUS & JAMES M. DOYLE, *EYEWITNESS TESTIMONY: CRIMINAL AND CIVIL* § 2-7, at 22 (3d ed. 1997). The point is simply that in particular circumstances, eyewitness identifications of strangers may be much less reliable than their treatment in the criminal justice system implies.

415. SOLSO, *supra* note 414, at 120.

416. See *State v. Warren*, 635 P.2d 1236, 1241 (Kan. 1981) (referring to “[t]he problem inherent in eyewitness identification from criminal lineups”).

417. SOLSO, *supra* note 414, at 120.

418. See *id.* at 120-21 (“[Remembering a face] is something like a race in which two runners run at different rates. The faster runner is analogous to feature learning, and the slower runner is analogous to learning relationships [between features].”).

419. *Id.*

420. *Id.* at 121, Figure 4.16.

activity than true recollection.⁴²¹ The photographic array used in many criminal cases, including *Gunning* and *Harris*,⁴²² probably implicates these processes. These problems are increased when cross-racial identification is at issue.⁴²³

A consistent policy of warning the jury of possible risks of eyewitness identification if certain factors are present could counteract these problems.⁴²⁴ This alternative strikes a balance between legally ignoring these problems and overemphasizing them in some cases by encouraging expert testimony on the issue. One scholar has suggested that such instructions may not be enough to overcome the prejudice that could result from an inaccurate identification.⁴²⁵ As a solution, some propose that states should permit expert testimony on the factors that may skew eyewitness perception.⁴²⁶ It is not surprising that the Court of Appeals did not consider this possibility in *Gunning*. Maryland law assumes that juries can and will follow instructions given to them, even if the instructions are to disregard improper testimony.⁴²⁷ Moreover, defendants who are represented by public defenders are extremely unlikely to have the financial resources to hire scientific experts. Given that such testimony presumably would be too

421. *Id.* at 59.

It is known that true memories tend to be related to more physical and sensory details than are false memories which tend to show activity in the frontal cerebral cortex, where decision-making and associative memory seem to be located. It is almost as if false memories are related to a search for sensory evidence. The cerebral migration in creating a false alarm originates in the medial temporal lobe, which is active when general recall takes place, and then moves to higher-order associative regions. During the reconstruction process similar memories may be mistaken for real memories.

Id.

422. See *Gunning*, 347 Md. at 338, 701 A.2d at 377 (stating that Ms. Carponetto identified the defendant from a "photographic array"); *Gunning v. State*, No. 2031, slip op. at 1 (Md. Ct. Spec. App. filed Aug. 8, 1995) (per curiam) (noting that "[t]hree days after the incident, Officer Joseph Massey showed the victim's husband a photographic array from which he identified appellant").

423. See *State v. Long*, 721 P.2d 483, 489 (Utah 1986) ("A good example of the effect of preconceptions on the accuracy of perception is the well-documented fact that identifications tend to be more accurate where the person observing and the one being observed are of the same race." (citing Wells, *supra* note 400; Johnson, *supra* note 403)).

424. See *State v. Warren*, 635 P.2d 1236, 1243 (Kan. 1981) (suggesting that "the problem [of the inherent unreliability of eyewitness identifications] can be alleviated by a proper cautionary instruction to the jury which sets forth the factors to be considered in evaluating eyewitness testimony").

425. See O'Hagan, *supra* note 369, at 753 (finding it "doubtful, however, that [such jury instructions] will ameliorate . . . these problems").

426. See *id.* at 755 (discussing the nature and purpose of expert testimony on eyewitness identifications).

427. See *Dennison v. State*, 87 Md. App. 749, 760, 591 A.2d 568, 573 (1991) (stating that "[i]t is generally held that the jury can and will follow curative instructions").

expensive for many defendants, a mandatory jury instruction is less likely to result in a two-tier system of justice, in which wealthier defendants are able to offer expert testimony to counter juror misperceptions of eyewitness testimony while poorer defendants are unable to counter those misperceptions at all.

5. *Conclusion.*—The Court of Appeals's decision in *Gunning* reflects the court's confidence in trial judges' abilities to determine when particular evidence should prompt a jury instruction. While the court offers general guideposts for when an identification instruction should be given,⁴²⁸ the opinion emphasizes the necessity that a trial judge exercise discretion in making this decision, instead of establishing a general rule of procedure.⁴²⁹ The court rejects the suggestion that eyewitness testimony raises unusual problems that justify the establishment of mandatory instructions on such testimony.⁴³⁰ In doing so, the court overlooks credible scientific evidence demonstrating that eyewitness identification raises unique problems for the criminal justice system. Insofar as juries tend to overestimate the reliability of eyewitness identification and underestimate the problems of perception inherent in identifying a stranger seen for a brief period of time,⁴³¹ the court should have required a cautionary instruction to be given when eyewitness identification is uncorroborated and central to the prosecution's case, in order to ameliorate the risks of unjust convictions.

LESLIE H. SPIEGEL

428. See *Gunning*, 347 Md. at 354, 701 A.2d at 384-85 (providing that the instruction should be given careful consideration "[w]hen uncorroborated eyewitness testimony is a critical element of the State's case and doubts have been raised about the reliability of that testimony" and that the instruction may be omitted when "there is corroboration of the defendant's participation in the crime, when the circumstances surrounding the eyewitness identification do not give rise to any reasonable doubts as to its accuracy, or when other instructions contain criteria or guidance that is similar to the requested instruction").

429. See *id.* ("In summary, the error in the instant cases lies perhaps in the trial judge's abusing his discretion by failing to give an identification instruction but even more clearly in failure to even exercise his judicial discretion.").

430. See *id.* at 345, 701 A.2d at 380 (refusing to adopt a "rigid rule[]" on the appropriateness of an eyewitness identification instruction and instead leaving the issue to the trial judge's discretion).

431. See *supra* notes 406-423 and accompanying text.

VIII. FAMILY LAW

A. *Violations of the Interstate Compact on the Placement of Children: Implication on Subsequent Petitions for Adoption*

In *In re Adoption/Guardianship No. 3598*,¹ the Court of Appeals considered whether the trial court erred in granting a third party's adoption petition over the objection of the natural father and despite violations of the express terms of the Interstate Compact on the Placement of Children (ICPC).² A unanimous court said no, holding that the best interest of the child standard is the "golden rule"³ in all adoption proceedings and that the circuit court properly relied on this standard in approving the adoption.⁴ In granting the adoption petition in this case, the court correctly proclaims that the best interest of the child takes precedence over enforcement of ICPC procedures, thereby upholding the best interest of the child standard as the prevailing consideration in all adoption cases. In so doing, the court created an informal analysis for determining the effect an ICPC violation will have on a subsequent petition to adopt.

1. *The Case.*—In 1991, twenty-one-year-old Jerry C. (Jerry) met an eighteen-year-old high school student, Amy S. (Amy), at a dance club in Dutchess County, New York.⁵ Jerry and Amy met frequently at various night clubs,⁶ and in the summer of 1991 Amy became pregnant after spending the night with Jerry.⁷ Shortly thereafter, Amy moved to the other side of Poughkeepsie, New York to live with her mother and stepfather.⁸ Several months later, when they ran into each other at a nightclub, Amy informed Jerry that she was pregnant.⁹ Jerry, who was employed at the time, did not deny paternity and "expressed a willingness to support the child."¹⁰ Jerry's support consisted

1. 347 Md. 295, 701 A.2d 110 (1997).

2. *Id.* at 301, 701 A.2d at 113; *see also* INTERSTATE COMPACT ON THE PLACEMENT OF CHILDREN (Am. Pub. Human Servs. Ass'n 1997) [hereinafter ICPC] (consisting of ten articles defining the types of placements subject to the law and the procedures to be followed in making interstate placements); *see infra* part 2.a (discussing the history and applicability of the ICPC in interstate placements of children).

3. *In re Adoption/Guardianship No. 3598*, 347 Md. at 323, 701 A.2d at 124.

4. *Id.*

5. *Id.* at 301, 701 A.2d at 113.

6. *Id.*

7. *Id.* at 301-02, 701 A.2d at 113.

8. *Id.* at 302, 701 A.2d at 113.

9. *Id.*

10. *Id.*

of twice driving Amy to the hospital to receive prenatal care.¹¹ Jerry never offered to pay any of Amy's medical expenses.¹² Consequently, Amy went to the Department of Social Services to obtain public assistance for her medical expenses.¹³ At the time she applied for public assistance, Amy did not know Jerry's full name. The Department of Social Services had to contact his employer for the information.

Jerry and Amy had little contact during the remaining months of her pregnancy.¹⁴ Jerry tried to call Amy and visit her at her home, but he was unable to speak to her or see her.¹⁵ During this time, Amy received "home-teaching" and met frequently with a social worker.¹⁶ The social worker recommended adoption as an option for Amy and her child.¹⁷ Through a friend, the social worker learned that Paul and Deborah M. (Paul and Deborah), of Maryland, wanted to adopt a baby.¹⁸ Amy agreed to the adoption, and she called Paul and Deborah to begin negotiating the terms of the adoption.¹⁹ The negotiations included several telephone conversations and one meeting.²⁰ Amy represented that she did not know the name of the natural father and that he was "out of the picture."²¹

11. *Id.*, 701 A.2d at 114. Because of the pregnancy, Amy experienced problems with her mother and stepfather. *Id.* at 302-03, 701 A.2d at 114. Perceiving these problems, Jerry's mother invited Amy to move into Jerry's home. *In re Adoption/Guardianship No. 3598*, 109 Md. App. 475, 480, 675 A.2d 170, 173 (1996), *rev'd*, 347 Md. 295, 701 A.2d 110 (1997). Amy declined this invitation. *In re Adoption/Guardianship No. 3598*, 347 Md. at 303, 701 A.2d at 114.

12. *In re Adoption/Guardianship No. 3598*, 347 Md. at 303, 701 A.2d at 113-14.

13. *Id.* n.2, 701 A.2d at 114 n.2.

14. *Id.* at 303, 701 A.2d at 114.

15. *Id.* Amy confirmed that, on one occasion, her mother and stepfather turned Jerry and his mother away from Amy's home because Amy did not want to see Jerry. *Id.*

16. *Id.*

17. *Id.*

18. *Id.* at 303-04, 701 A.2d at 114.

19. *Id.* at 304, 701 A.2d at 114. The arrangement agreed upon is called an "independent adoption." H. JOSEPH GITLIN, *ADOPTIONS: AN ATTORNEY'S GUIDE TO HELPING ADOPTIVE PARENTS* 9 (1987). While a few states require that all adoptions involving unrelated parties be conducted by an authorized placement agency, most states allow birth parents to make a placement without an agency. *Id.* A facilitator, usually an attorney, brings together birth parents and prospective adoptive parents and they negotiate the terms of the adoption directly or through the facilitator. *Id.* Generally, in an agency directed adoption, the birth parents simply surrender the child to the agency which in turn places the child in foster care pending the application approval of prospective adoptive parents. *See In re Lynn M.*, 312 Md. 461, 464 n.1, 540 A.2d 799, 800 n.1 (1988) (discussing the difference between independent and agency adoptions). The birth parents in an arrangement independent of an agency, in contrast, have more power to select the adoptive parents and often discharge the baby into the temporary custody of the intended adoptive parents while the court's final adoption decree is pending. *Id.*

20. *In re Adoption/Guardianship No. 3598*, 347 Md. at 304, 701 A.2d at 114.

21. *Id.*

In April 1992, Paul and Deborah agreed with Amy on the terms of the adoption.²² Pursuant to the agreement, Paul and Deborah retained an attorney to represent Amy and to administer the documents necessary to comply with the ICPC.²³ Amy and her attorney filed the initial application with the New York State ICPC Administrator.²⁴ On the application, Amy indicated that the natural father was "unknown."²⁵

Amy gave birth to Baby Girl S. (Baby S.) in Poughkeepsie on May 3, 1992.²⁶ Jerry and his family attempted to see Baby S. two days later.²⁷ Hospital security, however, escorted them out before they were able to see the child.²⁸ Upon their removal, Amy's attorney gave custody of Baby S. to Deborah, the intended adoptive mother.²⁹ Deborah then took the baby to her father's house in New Paltz, New York to await permission from the New York and Maryland ICPC Administrators to take the baby to Maryland.³⁰

On the same day, Amy, through her counsel, filed an Affidavit Relating to the Biological-Father's Consent and an Extrajudicial Consent Form 2-G with the Surrogate's Court of Ulster County, New York.³¹ Both forms were necessary to grant Amy permission to place the child with the adoptive parents.³² To expedite her child's placement and, ultimately, the adoption, Amy made false statements in both documents as to Jerry's identity and did not notify Jerry of the Surrogate Court proceeding.³³

22. *Id.*

23. *Id.*, 701 A.2d at 114-15.

24. *Id.* This application, Form ICPC-100A, acts as the initial interstate placement request. Mitchell Wendell & Betsey R. Rosenbaum, *Interstate Adoptions: The Interstate Compact on the Placement of Children*, in 1 ADOPTION LAW AND PRACTICE app. 3-A § 3-A.01.05 (Joan Heifetz Hollinger ed., December 1998 & Supp. April 1998). By completing the form, New York provides formal written notice to Maryland of its intention to make a placement in its state and, effectively, asks Maryland to make a finding as to whether the placement would be in the child's best interest. *Id.*

25. *In re Adoption/Guardianship No. 3598*, 347 Md. at 304, 701 A.2d at 115. Prior to trial, all parties stipulated that Amy knew the Respondent's name and whereabouts. *Id.*

26. *Id.*

27. *Id.* at 304, 701 A.2d at 115.

28. *Id.* at 304-05, 701 A.2d at 115.

29. *Id.* at 305, 701 A.2d at 115.

30. *Id.*

31. *Id.* Amy's affidavit stated: "The biological father of the child is unknown to [the natural mother] and no person has taken steps to establish legal responsibility for the child." *Id.* (alteration in original). Similarly, Amy stated in the Extrajudicial Consent Form that Jerry's full name and address were "unknown." *Id.*

32. *Id.*

33. *Id.*

On May 7, 1992, four days after the birth of Baby S., Jerry filed a petition for a Filiation Order in the Family Court of Dutchess County, New York, seeking to be declared the father of Baby S.³⁴ Amy's attorney responded in a letter in which he informed the court that Amy admitted that Jerry was the natural father.³⁵ The attorney requested an entry of a decree of paternity to facilitate the Surrogate Court proceeding.³⁶ Notwithstanding the letter, Jerry was not declared the natural father until June 7, 1993, because Amy subsequently contested Jerry's paternity.³⁷

Two weeks after the birth, between May 16 and May 18, 1992, Paul and Deborah returned to Maryland with Baby S. because their attorney in Maryland notified them that the ICPC Administrators in Maryland and New York had verbally approved the adoption.³⁸ In fact, however, neither New York nor Maryland ever approved the application.³⁹ On May 22, 1992, Paul and Deborah filed a Complaint for Adoption and Change of Name in the Circuit Court for Harford County.⁴⁰ The complaint named Jerry as the natural father, and admitted that Jerry had not consented to the adoption of Baby S.⁴¹ The complaint also included a Show Cause Order and Notice of Objection to be served on Jerry.⁴²

On June 18, 1992, the Circuit Court for Harford County granted Paul and Deborah temporary custody of Baby S.⁴³ The Show Cause Order was issued on the same day in order to notify Jerry that he had the right to protest the adoption of Baby S.⁴⁴ He evaded service by

34. *Id.* at 306, 701 A.2d at 115.

35. *Id.* The attorney's letter informed the Family Court of Dutchess County that Amy had entered into an adoption agreement before the birth of Baby Girl S., and that the ICPC requirements were "near completion." *Id.*, 701 A.2d at 115-16. Also, the letter acknowledged that the father was entitled to notice of the proceeding in the Surrogate Court given a recent decision in New York. *Id.*, 701 A.2d at 116. Nevertheless, Jerry was not notified of the proceedings. *Id.* at 307 n.5, 701 A.2d at 116 n.5. Furthermore, the affidavit and consent form filed with the Surrogate Court were not corrected to reflect Amy's admission that Jerry was the natural father. *Id.*

36. *Id.* at 306, 701 A.2d at 116.

37. *Id.* at 307, 701 A.2d at 116. The paternity dispute caused considerable delay because it made it necessary for Amy, Jerry, and Baby S. to have blood drawn, which could not be done until the child was six months old. *Id.*

38. *Id.*

39. *Id.* The ICPC Administrator for New York left a message with the office of Paul's and Deborah's attorney stating approval had been granted. *Id.* n.6. The attorney interpreted the message to mean that both states had granted approval. *Id.*

40. *Id.* at 308, 701 A.2d at 116.

41. *Id.*

42. *Id.*

43. *Id.*

44. *Id.*

mail and private process numerous times⁴⁵ and was finally served by Amy's attorney at a paternity hearing in New York in April 1993.⁴⁶ Nonetheless, Jerry had knowledge of the adoption petition pending in Harford County as early as August 1992.⁴⁷

On June 11, 1993, after receiving the Order of Filiation from the Dutchess County, New York court declaring him to be the natural father, Jerry filed a notice of objection to the adoption in the Circuit Court for Harford County.⁴⁸ Subsequently, an attorney was appointed to represent the interests of Baby S.⁴⁹ The court-appointed attorney was charged with investigating the case and recommending to the court a placement that would serve the child's interest and welfare.⁵⁰ In addition, a social worker was assigned to conduct a similar investigation.⁵¹ Despite two letters of request, Jerry did not make himself available for an interview with the social worker, but the attorney did have the opportunity to meet with him.⁵² In reports submitted to the court, both concluded that the interest of Baby S. would be best served by permanent placement with the adoptive parents.⁵³

On March 7, 1994, the adoption petition came to trial before the Circuit Court for Harford County.⁵⁴ In a sixty-three page memorandum opinion issued November 9, 1994, the trial court granted Paul

45. *Id.* The first Show Cause Order was served in July 1992 by restricted certified mail. *Id.* It was returned and marked "unclaimed." *Id.* The Show Cause Order was then attempted to be served by private process. *Id.*, 701 A.2d at 116-17. In a sworn affidavit, the process server stated that several attempts were made to serve Respondent at his home. *Id.* at 308, 701 A.2d at 117. The process server even tried to set up an appointment, but Jerry did not reply. *Id.*

46. *Id.* at 308, 701 A.2d at 117.

47. *Id.*

48. *Id.* at 309, 701 A.2d at 117.

49. *Id.* Section 5-323 of the Family Law Article mandates the appointment of separate counsel for a child when the termination of a natural parent's rights is at issue. MD. CODE ANN., FAM. LAW § 5-323 (Supp. 1998).

50. *In re Adoption/Guardianship No. 3598*, 347 Md. at 309, 701 A.2d at 117.

51. *Id.*

52. *Id.* at 308 n.9, 701 A.2d at 117 n.9.

53. *Id.* at 309, 701 A.2d at 117. In a letter to the court, the attorney for Baby S. stated:

When I speak with [the adoptive parents], what they tell me is honest and consistent with my observations. Jerry [and his mother], on the other hand, seem to put the best "spin" on everything they say to me, apparently saying what they think I want to hear. There is frequently a sense of dissonance between their words and my perceptions.

Id. n.9.

54. *Id.* at 310, 701 A.2d at 117. Jerry had also filed a motion to dismiss the adoption petition on December 14, 1993, citing violations of the ICPC. *Id.* The court denied the motion. *Id.*

and Deborah's adoption petition.⁵⁵ Judge Cypert O. Whitfill determined that Petitioner's violation of the ICPC was not intentional because they had transported the child into Maryland on a "good faith" belief that approval had been given.⁵⁶ Judge Whitfill based his decision not to return the child to New York "while the wheels of bureaucracy grind" on both precedent and his belief that the purpose of the ICPC had been met by placing this child with Paul and Deborah.⁵⁷ Judge Whitfill further considered Jerry's argument that his rights had been impaired because of the several violations of the ICPC. Balancing Amy's conduct and that of Jerry, Judge Whitfill acknowledged that Amy's lies were unfortunate, but he determined that the only reason to remove the child from Paul and Deborah's care would be to "correct some injustice perpetrated on [Jerry] by [Amy], [Paul and Deborah], or one or more of the State authorities."⁵⁸ Judge Whitfill reasoned that no injustice was perpetrated upon Jerry and that he was not denied any substantial right.⁵⁹ Jerry, rather, "simply did not move quickly enough to plan for and provide a home for an infant child. . . . It would be a grave injustice on the child to require her to break the bonds she has established with [Paul and Deborah]" ⁶⁰ Thus, the court entered the final adoption decree on March 24, 1995.⁶¹

Jerry appealed the trial court's decision, arguing that dismissal of the adoption petition was appropriate under the circumstances, because Paul and Deborah had subverted ICPC procedures and had purposefully held the child in Maryland until the child's best interests necessitated adoption.⁶² Jerry also argued that the trial judge erred when he determined, pursuant to Section 5-312 of the Family Law Article, that it was in the child's best interest to approve the adoption without Jerry's consent.⁶³ The Court of Special Appeals agreed, and

55. *In re Adoption of a Minor*, No. 3598-7-20, at 63 (Harford Cty. Cir. Ct. Nov. 9, 1994), *rev'd*, *In re Adoption/Guardianship* No. 3598, 109 Md. App. 475, 675 A.2d 170 (1996), *rev'd*, 347 Md. 295, 701 A.2d 110 (1997).

56. *In re Adoption of a Minor*, No. 3598-7-20, at 59-62.

57. *Id.* at 61.

58. *Id.* at 57.

59. *Id.*

60. *Id.*

61. *In re Adoption/Guardianship* No. 3598, 109 Md. App. 475, 487, 675 A.2d 170, 176 (1996), *rev'd*, 347 Md. 295, 701 A.2d 110 (1997). The respondent filed a motion to reopen the case before the trial court based on new evidence. *Id.* The motion was denied. *Id.*

62. Appellant's Brief at 13, *In re Adoption/Guardianship* No. 3598, 109 Md. App. 475, 675 A.2d 170 (1996) (No. 672).

63. *Id.*

in a 2-1 decision, the court reversed the trial court's decision and ordered the adoption dismissed.⁶⁴

Writing for the majority, Judge Bloom, joined by Judge Cathell, held the trial court abused its discretion in failing to dismiss the adoption on the basis of the ICPC violations.⁶⁵ The court found that either Paul and Deborah or their attorney had knowingly violated the ICPC, which violation rendered the Maryland Compact Administrator "powerless" to determine the best interests of Baby S.⁶⁶ The Court of Special Appeals was unwilling to permit Petitioner's "flagrant" violations of the ICPC to be excused under the "guise" of best interest of the child standard.⁶⁷ The court noted that here, unlike other cases involving ICPC violations, there was a "willing and able" natural father seeking custody.⁶⁸ The court contended that "the [best interest of the child] exception swallows up the rule" because courts that are confronted with a violation will grant the adoption as "the most attractive course" given that the child will have bonded with the adoptive parents.⁶⁹ Thus, the court opined, overlooking ICPC violations based on the best interest of the child standard sends a message to adoptive parents that violating the ICPC "is not only permissible but advantageous."⁷⁰

The Court of Special Appeals further noted that Jerry's failure to receive notice of New York Surrogate Court proceedings was reprehensible.⁷¹ The court surmised that neither the New York Compact office nor the Surrogate Court would have allowed Paul and Deborah to remove the child had Jerry been identified as the biological father.⁷² The majority also found that while it was "obligated" to accept the findings of the trial court, those findings supported only the conclusion that Amy had good reason to seek adoption as an option.⁷³ The court, asserting "there is not a scintilla of evidence . . . that [Jerry] did not want to assume the role of father," determined that the trial court did not properly follow the statutory requirements for granting an adoption to a third party without a natural parent's consent.⁷⁴

64. *In re Adoption/Guardianship No. 3598*, 109 Md. App. at 518-19, 675 A.2d at 191.

65. *Id.* at 503, 675 A.2d at 184.

66. *Id.* at 492, 675 A.2d at 178.

67. *Id.* at 507, 675 A.2d at 186.

68. *Id.* at 510, 675 A.2d at 187.

69. *Id.*

70. *Id.*

71. *Id.* at 491-93, 675 A.2d at 178-79.

72. *Id.* at 504, 675 A.2d at 184.

73. *Id.* at 514, 675 A.2d at 189.

74. *Id.* at 507, 675 A.2d at 186.

Judge Hollander dissented from the majority opinion, contending that the majority had exceeded its standard of review under the guise of abuse of discretion.⁷⁵ The trial court, Judge Hollander asserted, was permitted to conclude that the ICPC violations were not made in bad faith and, thus, did not warrant dismissal of the adoption petition based on a balancing of "all the facts, circumstances, and equities" before it.⁷⁶

Paul and Deborah appealed the Court of Special Appeals's decision. The Court of Appeals granted certiorari to consider whether the trial court abused its discretion in relying on the best interest of the child standard to grant the adoption petition despite the violation of the ICPC.⁷⁷

2. *Legal Background.*—The Court of Appeals has, on numerous occasions, ruled on cases in which a natural parent contests the adoption of a child by a third party.⁷⁸ The court has also addressed the issue of appropriate sanctions for violations of the ICPC.⁷⁹ No case in Maryland, however, has dealt with a natural parent seeking to stop an adoption based on a violation of the ICPC.⁸⁰ The novel question that this case presents warrants an examination of the ICPC. It is also helpful to explore Maryland statutory law governing a court's ability to effectuate an adoption without the consent of a natural parent.

75. *Id.* at 521, 675 A.2d at 192 (Hollander, J., dissenting).

76. *Id.* at 519, 675 A.2d at 192.

77. *In re Adoption/Guardianship No. 3598*, 347 Md. at 310, 701 A.2d at 113.

78. *See, e.g., In re Adoption/Guardianship No. 10941*, 335 Md. 99, 112-13, 642 A.2d 201, 208 (1994) (granting a petition for termination of parental rights over the objection of the natural mother because she was found indefinitely unfit to care for her child); *Walker v. Gardner*, 221 Md. 280, 284, 157 A.2d 273, 275-76 (1960) (upholding adoption decree over the objection of the biological father because he made no effort to see or provide for his child); *King v. Shandrowski*, 218 Md. 38, 42-44, 145 A.2d 281, 284-85 (1958) (holding that the granting of an adoption petition is warranted over the objection of the natural mother where the child has been in the custody of the intended adoptive parents for three years with the consent of both natural parents); *Dietrich v. Anderson*, 185 Md. 103, 120-21, 43 A.2d 186, 193 (1945) (affirming decree granting custody of child to foster parents because the natural father and mother, in separate appeals, failed to demonstrate any material change in their circumstances).

79. *See In re Adoption No. 10087*, 324 Md. 394, 413, 597 A.2d 456, 466 (1991) (holding that retroactive compliance is the proper recourse when a child has been brought to Maryland in violation of the ICPC).

80. *See In re Adoption/Guardianship No. 3598*, 109 Md. App. 475, 507, 675 A.2d 170, 186 (1996) (noting that cases in which courts have used the best interest of the child standard to excuse an ICPC violation did not involve a natural parent contesting the adoption), *rev'd*, 347 Md. 295, 701 A.2d 110 (1997).

a. *Interstate Compact on the Placement of Children*.—An interstate compact is a binding contract between party states that takes the form of a statute enacted by the legislature of each member state.⁸¹ The Compact Clause of the Constitution, which authorizes such interstate compacts, provides that “[n]o State shall, without the Consent of Congress . . . enter into any Agreement or Compact with another State.”⁸² The requirement of congressional consent, however, has been held to apply only to compacts that infringe on federal powers.⁸³ Thus, the ICPC does not demand congressional consent because its primary focus, child welfare, is a traditional state concern.⁸⁴

The ICPC traces its roots to a small group of social service administrators in the 1950s who were concerned about the problems associated with interstate adoption and foster care placements.⁸⁵ The New York State Legislative Committee on Interstate Cooperation responded to those concerns by drafting the ICPC.⁸⁶ The goal was to create procedures that would facilitate interstate adoptions, thereby increasing the number of acceptable placements for children.⁸⁷ Toward this end, the ICPC extends jurisdiction of a party state into the border of another party state to allow for investigation of a proposed placement prior to adoption or foster care, and supervision of that placement once it has been made.⁸⁸

The ICPC consists of ten articles establishing procedures to be followed in making an interstate pre-adoptive or foster care placement.⁸⁹ Primarily, its function is to protect children by requiring procedures to be followed in making and maintaining placements for children awaiting foster care and permanent adoptive homes.⁹⁰ The language found in Article I articulates this function by outlining the ICPC's purpose and policy. Its first objective includes maximizing the

81. THE COUNCIL OF STATE GOVERNMENTS, *INTERSTATE COMPACTS & AGENCIES* vi (1983).

82. U.S. CONST. art. I, § 10.

83. See *Virginia v. Tennessee*, 148 U.S. 503, 519 (1893) (finding that, in considering the constitutionality of a boundary compact entered into and agreed upon by Virginia and Tennessee, “the prohibition [against entering into such a compact] is directed to the formation of any combination tending to the increase of political power in the States, which may encroach upon or interfere with the just supremacy of the United States”).

84. See THE COUNCIL OF STATE GOVERNMENTS, *supra* note 296, at vi.

85. Bernadette W. Hartfield, *The Role of The Interstate Compact on the Placement of Children in Interstate Adoption*, 68 NEB. L. REV. 292, 295 (1989).

86. *Id.*

87. *Id.*

88. *Id.* at 296.

89. THE SECRETARIAT TO THE ASSOCIATION OF ADMINISTRATORS OF THE INTERSTATE COMPACT ON THE PLACEMENT OF CHILDREN, *GUIDE TO THE INTERSTATE COMPACT ON THE PLACEMENT OF CHILDREN* 11 (Maryland Department of Human Resources, reprint 1987).

90. *Id.* at 3.

opportunity for children "to be placed in a suitable environment and with persons or institutions having appropriate qualifications and facilities."⁹¹ Second, the ICPC strives to apprise the state in which the child is to be placed of the circumstances surrounding the placement.⁹² Third, the ICPC grants power to the state from which the child is coming to evaluate the proposed placement.⁹³ Finally, clarity of jurisdictional conflicts is a goal of the ICPC.⁹⁴

The Compact Administrator in each member state coordinates ICPC matters within that state.⁹⁵ Article VII of the ICPC authorizes the compact administrators to jointly promulgate compact rules and regulations.⁹⁶ The organizing body through which such rules and regulations are administered is the Association of Administrators of the Interstate Compact on the Placement of Children,⁹⁷ which is affiliated with the American Public Human Services Association (the Association). The Association provides for a Secretariat of the Association of Administrators.⁹⁸ The Secretariat coordinates ICPC activities on a national level, including issuing advisory opinions with regard to implementation of ICPC procedures at the state level.⁹⁹ The opinions, while not legally binding, are often cited by courts as persuasive authority in ICPC matters.¹⁰⁰

The prerequisites for accomplishing a lawful interstate placement are contained in Article III. The procedures are applicable to all interstate placements of a child for the purpose of providing a foster care or adoptive situation, whether facilitated by a public or private adoption agency or an individual "except for those placements ex-

91. *Id.* at 11.

92. *Id.*

93. *Id.*

94. *Id.*

95. *Id.* at 5.

96. *Id.* at 14.

97. AMERICAN PUBLIC WELFARE ASSOCIATION, THE INTERSTATE COMPACT ON THE PLACEMENT OF CHILDREN: COMPACT ADMINISTRATORS' MANUAL 4.1 (Compact Provisions, An Interpretive Commentary) (1982) [hereinafter COMPACT ADMINISTRATORS' MANUAL].

98. COMPACT ADMINISTRATOR'S MANUAL, *supra* note 311, at 4.1.

99. *Id.*

100. See GITLIN, *supra* note 19, at 116; *e.g.*, *In re Adoption/Guardianship No. 3598*, 109 Md. App. 475, 500, 675 A.2d 170, 182 (1996) (relying, in part, on an advisory opinion issued by the Secretariat in 1993 that specifically rejected retroactive compliance as a means to deal with ICPC violations to argue that such an approach would not have been an appropriate course for the trial court to take), *rev'd*, 347 Md. 295, 701 A.2d 110 (1997); *In re Adoption of Jon K.*, 535 N.Y.S.2d 660, 662 (Fam. Ct. 1988) (finding authority in a 1988 Secretariat Opinion to rule that the court did not have the ability to make a preliminary conclusion as to the child's best interests because it rested within the statutory obligation of the compact administrator to make such a determination).

pressly exempted in article VIII of ICPC."¹⁰¹ To effectuate a valid placement, the sending agency¹⁰² must submit written notice to the receiving state¹⁰³ of the intention to place the child.¹⁰⁴ The notice includes information such as the identity and address of the parents or legal guardians, and the name and address of the person or institution with which the child is to be placed.¹⁰⁵ Also, the notice must provide an explanatory statement as to the reason for the proposed placement.¹⁰⁶ The child must not be brought into the receiving state until the office of the Compact Administrator of the receiving state notifies the sending agency, in writing, "that the proposed placement does not appear to be contrary to the interests of the child."¹⁰⁷

Violations of the provisions of the ICPC may result in sanctions. Article IV provides for two penalties.¹⁰⁸ First, failure to observe ICPC procedures is considered a breach of a party state's child placement laws, thus providing for punishment in either state.¹⁰⁹ Second, a violation by a licensed child placement agency constitutes grounds for suspension or revocation of that license.¹¹⁰ The ICPC does not expressly provide for sanctions against biological parents, prospective adoptive parents, or their counsel, for violations occurring in an independent adoption.¹¹¹

101. See GUIDE TO INTERSTATE COMPACT ON THE PLACEMENT OF CHILDREN, *supra* note 303, at 5; see also Wendell & Rosenbaum, *supra* note 24, § 3-A.03, at 3A-4 (explaining that Article VIII of the ICPC exempts those placements which are made *between* close relatives of the child or persons acting as full guardian for the child); cf. *infra* note 152 and accompanying text (noting that some courts have held the ICPC inapplicable to independent adoptions).

102. A "sending agency" is defined as an officer of a party state, a corporation, charitable organization, association, or individual which sends or brings a child into another party state. GUIDE TO THE INTERSTATE COMPACT ON THE PLACEMENT OF CHILDREN, *supra* note 303, at 11.

103. A "receiving state" is the state to which the child is to be sent or brought. *Id.*

104. *Id.* at 12.

105. *Id.*

106. *Id.* The child's social and case history, a report on the homestudy of the prospective adoptive parents, and "[a]ny other information necessary for the particular case" are attached to the notice as additional documentation. Wendell & Rosenbaum, *supra* note 24, § 3-A.05, at 3A-6.

107. GUIDE TO THE INTERSTATE COMPACT ON THE PLACEMENT OF CHILDREN, *supra* note 303, at 12; see Wendell & Rosenbaum, *supra* note 24, § 3-A.05, 3A-6 to 3A-7 (noting that the "negative phraseology is important" because the standard is not the "best" placement, but that which will be safe and unlikely to be detrimental to the child).

108. GUIDE TO THE INTERSTATE COMPACT ON THE PLACEMENT OF CHILDREN, *supra* note 303, at 12.

109. *Id.*

110. *Id.* at 13.

111. *Id.* But see, e.g., *In re Adoption of Calynn, M.G.*, 523 N.Y.S.2d 729, 731 (Sur. Ct. 1987) (upholding a petition to adopt despite violations of the ICPC, but imposing mone-

b. Violations of the ICPC as a Basis for Dismissing Adoption Petitions.—To date, all fifty states and the District of Columbia have enacted the ICPC.¹¹² Even with full participation, however, the integrity of the ICPC has suffered because of noncompliance with its procedures. The ineffectiveness of the ICPC is most apparent in the context of independent adoptions. First, attorneys inexperienced in interstate adoptions may be unaware of the existence of the ICPC or unfamiliar with the idiosyncratic requirements of individual compact offices.¹¹³ Additionally, some parties may intentionally fail to comply with the ICPC procedures. Parties may choose to thwart the ICPC provisions to avoid the stricter regulations on independent adoptions¹¹⁴ or to avoid having to comply with the ICPC's time-consuming, bureaucratic procedures.¹¹⁵ Time may be crucial if immediate placement with the adoptive parents is desired.¹¹⁶ Lastly, noncompliance may be encouraged because the ICPC does not directly provide for penalties for violating its provisions in the context of an independent adoption.¹¹⁷

tary sanctions on the adoptive parents' attorney as a means to prevent continued circumvention of the ICPC procedures). See *supra* text accompanying note 19 (distinguishing independent adoptions from those facilitated by an agency).

112. GUIDE TO THE INTERSTATE COMPACT ON THE PLACEMENT OF CHILDREN, *supra* note 303, at 3.

113. See GITLIN, *supra* note 19, at 112; Mark T. McDermott, *Interstate Compact on the Placement of Children*, in ADOPTIONS AFTER THE NEW RULES D-01, D-7 (Md. Inst. for Continuing Professional Educ. of Lawyers, Inc. 1996) (asserting that "dealing with the ICPC is on of the biggest challenges" faced by adoption practitioners).

114. See Hartfield, *supra* note 84, at 304-05 (explaining controls placed on independent adoptions by states may include complete prohibition of anyone other than a parent or legal guardian from effectuating an adoptive placement or the imposition of restrictions on those persons who can act as a facilitator of an independent adoption); see McDermott, *supra* note 113, at D-18 to D-20 (discussing means by which states regulate the independent adoptive process).

115. Hartfield, *supra* note 84, at 305; see McDermott, *supra* note 113, at D-06 (discussing the obstacles posed by invoking the ICPC, including the unwillingness of some compact offices to coordinate with the requirements of the other state involved in the proposed adoption).

116. See *supra* text accompanying note 19 (explaining that one of the advantages of an independent adoption is immediate placement with the intended adoptive parents).

117. GUIDE TO THE INTERSTATE COMPACT ON THE PLACEMENT OF CHILDREN, *supra* note 303, at 12-13; see *In re Adoption No. 10087*, 324 Md. 394, 410 n.7, 597 A.2d 456, 464 (1991) (noting that the ICPC as enacted in Maryland provides for violations to be punished under the laws of either party state jurisdiction or, in terms of an authorized sending agency, for suspension or revocation of its license to place children but finding that "[n]o other Maryland law imposes a penalty for violation of the ICPC").

(1) *Maryland*.—The ICPC was enacted in Maryland in 1975 in substantially the same form as the model law.¹¹⁸ The Maryland courts have recognized that the provisions of the ICPC bind the citizens of Maryland because enforcing its provisions is the obligation of the participating states.¹¹⁹ At the same time, the court has made clear that the decision to grant an adoption petition is dictated by that which would best serve the interest and welfare of the child involved.¹²⁰

In Maryland, the best interest of the child is considered in all contested adoptions and “in all cases where those interests are in jeopardy.”¹²¹ The standard is not articulated by any single definition¹²² and, ultimately, the determination is made by the exercise of the broad discretionary authority vested in the trial judge.

The importance of the best interest of the child standard is marked by its numerous characterizations. A child’s best interest has been referred to as the “paramount”¹²³ or “primary”¹²⁴ consideration of “transcendent importance,”¹²⁵ and the “predominate theme”¹²⁶ in adoption cases. Thus, the overarching consideration in the case at bar was not the respondent’s interest in raising his child, but that which would promote the child’s best interest.

The court has also found it equally important that the best interest of the child not be adjudicated on generic principles, but rather

118. Interstate Compact on the Placement of Children, ch. 266, 1975 Md. Laws 1351 (codified as amended at MD. CODE ANN., FAM. LAW §§ 5-601 to -611 (1991 & Supp. 1998)).

119. *Bernhardt v. Lutheran Soc. Servs.*, 339 Md. App. 334, 344, 385 A.2d 1197, 1202 (1978).

120. *See In re Adoption/Guardianship No. A91-71A*, 334 Md. 538, 559, 640 A.2d 1085, 1096 (1994) (noting that the best interest of the child standard “has long been the standard used in Maryland to decide contested adoption cases”).

121. *See id.*, 640 A.2d at 1095-96 (applying the best interest of the child standard to resolve dispute between natural father and prospective adoptive parents); *Dietrich v. Anderson*, 185 Md. 103, 120, 43 A.2d 186, 193 (1945) (concluding that the best interest of the child would be served with a third party over objections from both natural parents).

122. *See Beckman v. Boggs*, 337 Md. 688, 703, 655 A.2d 901, 908-09 (1995) (noting that the definition of the best interest of the child standard “is often an elusive one”); *Ross v. Hoffman*, 280 Md. 172, 175 n.1, 372 A.2d 582, 585 n.1 (1977) (listing the various ways of defining the best interest of the child standard).

123. *See Beckman*, 337 Md. at 703, 655 A.2d at 908 (stating that “the paramount consideration must always be that which fulfills the needs of the child”).

124. *See Winter v. Director of the Dep’t of Pub. Welfare*, 217 Md. 391, 396, 143 A.2d 81, 84 (1958) (maintaining that “[w]hile the natural rights of parents should be carefully guarded, the welfare and best interests of the child are the primary considerations in all adoption proceedings”).

125. *See Dietrich v. Anderson*, 185 Md. 103, 116, 43 A.2d 186, 191 (1945).

126. *See In re Lynn M.*, 312 Md. 461, 463, 540 A.2d 799, 800 (1988).

determined on the facts and circumstances presented by each case.¹²⁷ It is worth noting this distinction, because it affirmatively recognizes the child as an individual with unique interests. This idea is perhaps more readily identified in the legislation that requires a child to be appointed her own counsel in certain adoption or guardianship proceedings, including those involving involuntary termination of parental rights.¹²⁸ The law in Maryland, therefore, directs the focus of the trial judge to the best interest of the particular child before the court, not to the best interest of the "hypothetical child."¹²⁹

In *In re Adoption No. 10087*,¹³⁰ the Court of Appeals held that the best interest of the child standard is applied in all adoption proceedings, including those in which ICPC violations are in question.¹³¹ The only case of its kind in Maryland, the court in *In re Adoption No. 10087* considered the appropriate sanction for ICPC violations in an independent adoption facilitated by an attorney.¹³² The case involved a Maryland couple who placed an advertisement expressing their desire to adopt a child.¹³³ The couple identified themselves by pseudonyms and gave a post office box address to preserve their anonymity.¹³⁴ The natural mother, a resident of Virginia, contacted the couple directly.¹³⁵ Both natural parents executed the requisite consent forms and affidavits in anticipation of adoption proceedings.¹³⁶ The documents, however, did not contain the names or addresses of the prospective adoptive parents.¹³⁷ Before the birth of the baby, the couple, with the assistance of their attorney, attempted to adhere to the ICPC.¹³⁸ The Virginia compact office instructed the couple that it was necessary for the birth mother to submit a handwritten application

127. See *Lippy v. Breidenstein*, 249 Md. 415, 420, 240 A.2d 251, 254 (1968) (explaining that what is held to be in the best interest of the child "necessarily depends on the facts and circumstances in each case" (citing *Shetler v. Fink*, 231 Md. 302, 190 A.2d 76 (1963))).

128. MD. CODE ANN., FAM. LAW § 5-323(a)(1)(i) (Supp. 1998) (stating the requirements for appointing counsel to "the individual to be adopted").

129. *In re Adoption/Guardianship No. 3598*, 109 Md. App. 475, 520, 675 A.2d 170, 192 (1996) (Hollander, J., dissenting).

130. 324 Md. 394, 597 A.2d 456 (1991).

131. See *id.* at 412, 597 A.2d at 465 (finding that "[t]he fact that the ICPC had been violated in this case does not mandate dismissal; rather it indicates the need for a prompt determination of the best interest of *this child*" (emphasis added)).

132. *Id.* at 413-14, 597 A.2d at 466.

133. *Id.* at 400, 597 A.2d at 459.

134. *Id.*

135. *Id.*

136. *Id.*

137. *Id.*

138. *Id.* at 401, 597 A.2d at 459. The couple "notif[ied] the compact offices in both Maryland and Virginia of the approaching adoption." *Id.*

that included the names and addresses of the adoptive parents.¹³⁹ The couple refused to comply.¹⁴⁰ In response, the Virginia compact office would not process the placement.¹⁴¹ The Maryland ICPC office received all of the necessary documentation, but it could not approve the placement without the Virginia office's approval.¹⁴² Upon the birth of the baby, the couple transported the child to Maryland with the knowledge that they did not have ICPC approval.¹⁴³ The couple subsequently filed an adoption petition in the Circuit Court for Montgomery County.¹⁴⁴ The trial court dismissed the petition on the grounds that the placement had been made in violation of the ICPC.¹⁴⁵ In an unreported opinion, the Court of Special Appeals affirmed the decision.¹⁴⁶

The Court of Appeals reversed the decision of the Court of Special Appeals and granted the petition to adopt.¹⁴⁷ The court noted that compliance with the ICPC, although necessary to assure the quality of the placement, is not "a substitute for a judicial determination of the child's best interest."¹⁴⁸ The court further articulated that an ICPC violation does not mandate dismissal of an adoption petition.¹⁴⁹ Such a violation demands "prompt determination of the best interest of this child."¹⁵⁰ The court encouraged circuit courts to consider "retroactive ICPC compliance" as an alternative to dismissing or approving adoption petitions without compliance.¹⁵¹

(2) *Other Jurisdictions.*—The ICPC's effectiveness also has been frustrated by the lack of uniform interpretation when a violation occurs.¹⁵² For example, at least one jurisdiction has held that the ICPC does not apply to independent adoptions.¹⁵³ Other jurisdic-

139. *Id.*, 597 A.2d at 459-60.

140. *Id.*, 597 A.2d at 460.

141. *Id.*

142. *Id.*

143. *Id.*

144. *Id.* at 402, 597 A.2d at 460.

145. *Id.*

146. *Id.*

147. *Id.* at 424, 597 A.2d at 471.

148. *Id.* at 411, 597 A.2d at 465.

149. *Id.* at 412, 597 A.2d at 465.

150. *Id.*

151. *Id.* The court also expressly found that the ICPC applies to independent adoptions. *Id.* at 404-05, 597 A.2d at 461-62. *But see id.* at 425-26, 597 A.2d at 472 (Eldridge, J., concurring in part and dissenting in part) (arguing that the ICPC is not applicable to independent adoptions).

152. Hartfield, *supra* note 84, at 303.

153. *See In re Adoption of M.M.* 652 P.2d 974, 981 (Wyo. 1982) (holding that the ICPC does not apply to placements that precede independent adoptions); *see also In re Adoption*

tions have removed children from pre-adoptive placements on the grounds of ICPC violations.¹⁵⁴ Still, some courts have ordered that the ICPC procedures be complied with before proceeding with an adoption petition. For example, in *In re Adoption of Jon K.*,¹⁵⁵ a New York Family Court dismissed a petition for adoption without prejudice until the New York Compact Administrator proceeded under the provisions of the ICPC.¹⁵⁶ The child in the case was brought to New York under peculiar circumstances and without the formal consent of the natural parents or compliance with the ICPC.¹⁵⁷ The prospective adoptive parents, who lived in New York, had long wished to have children and were interested in adopting a child.¹⁵⁸ The couple's aunt contacted them from California to inform them that a woman was seeking an adoptive home for her child. The couple arranged for the aunt to transport the child from California to New York. Three months after the child arrived in New York, the natural parents appeared in a court in California to acknowledge that they had surrendered the child to the adoptive parents.¹⁵⁹ The New York Family Court refused to proceed with the adoption petition before the appropriate investigation and evaluation of the proposed placement was complete in accordance with ICPC procedures.¹⁶⁰ The court reasoned that it was premature to determine whether the adoption was in the best interest of the child until such procedures were followed.¹⁶¹

The majority of courts, in contrast, have found that ICPC violations have little consequence on subsequent petitions for adoption. Three New York cases decided at the trial level, for example, found that judicial examination of an adoption petition was sufficient to determine the child's best interest even though ICPC compliance had

No. 10087, 324 Md. at 429-30, 597 A.2d at 474 (Eldridge, J., concurring in part and dissenting in part) (asserting that "the ICPC is inapplicable to a 'placement' in connection with an independent adoption").

154. See *T.W.S. v. Department of Health & Rehabilitative Servs.*, 466 So. 2d 387, 389 (Fla. Dist. Ct. App. 1985) (reversing a lower court's order to terminate state-supervised foster care and place a child with the paternal grandparents because the lower court failed to comply with any ICPC procedures or other statutory mandates).

155. 535 N.Y.S.2d 660 (Fam. Ct. 1988).

156. *Id.* at 660.

157. *Id.* at 661.

158. *Id.*

159. *Id.* The couple had no knowledge of the identity of the natural parents prior to the child's arrival in New York and had limited contact by telephone only subsequent to the birth of the child. *Id.*

160. *Id.* at 663.

161. *Id.*

not been met.¹⁶² Similarly, an intermediate appellate court in Florida held that a violation of the ICPC would not nullify subsequent adoption proceedings when "no harm was suffered by the failure to comply."¹⁶³ In *In re Adoption of C.L.W.*, the court considered an adoption petition in which the natural mother was seeking to revoke her consent to the adoption and reinstate her parental rights.¹⁶⁴ The natural parents and prospective adoptive parents negotiated the terms of the adoption of the unborn child, and agreed that the prospective adoptive parents would come to Pennsylvania to pick up the child immediately after the birth.¹⁶⁵ On the day of delivery the natural parents executed consent forms.¹⁶⁶ Three days later, however, the natural mother decided that she wanted the baby returned to her and her attorney notified the prospective adoptive mother.¹⁶⁷ Nonetheless, the adoptive mother left for Florida with the child without notifying the appropriate Pennsylvania or Florida agencies of her intention to transport the child or to institute adoption proceedings in Florida.¹⁶⁸ The natural mother executed a revocation of her consent, and she was granted custody by a Pennsylvania court.¹⁶⁹ The Florida circuit court, however, refused to enforce the Pennsylvania custody decision and awarded temporary custody to the prospective adoptive parents.¹⁷⁰ The natural mother did not appeal the decision of the Florida court.¹⁷¹

Subsequently, the prospective adoptive parents filed a petition for adoption, which the natural mother contested, in part because the adoptive parents had failed to comply with ICPC provisions requiring proper notification and investigation of the placement before the

162. See *In re Adoption of Calynn, M.G.*, 523 N.Y.S.2d 729, 730, 731 (Sur. Ct. 1987) (failing to invoke the ICPC did not mandate dismissal because child's best interests were served with the prospective adoptive parents where the natural mother could not be found); *In re Adoption of Baby Boy M.G.*, 515 N.Y.S.2d 198, 199, 201 (Sur. Ct. 1987) (finding that dismissal of the adoption petition unwarranted where parties complied with New York law but could not gain ICPC approval because the law of the sending party state prohibited attorney-facilitated adoptions); *In re Adoption of Baby "E."*, 427 N.Y.S.2d 705, 707, 711 (Fam. Ct. 1980) (finding that, despite violations, the "essential ingredients" of the ICPC where the child had lived all of its life with the adoptive parents).

163. See *In re Adoption of C.L.W.*, 467 So. 2d 1106, 1111 (Fla. Dist. Ct. App. 1985).

164. *Id.* at 1108.

165. *Id.*

166. *Id.*

167. *Id.*

168. *Id.*

169. *Id.*

170. *Id.*

171. *Id.* at 1109.

child could be transported to Florida.¹⁷² The Florida court concluded that a violation of the ICPC could not provide grounds for dismissal of the adoption petition because “no harm was suffered by the failure to comply with its requirement of notification to [the appropriate agency].”¹⁷³

Likewise, in *In re C.M.A.*,¹⁷⁴ a Minnesota court held that ICPC violations do not necessarily mandate that final adoption decrees be vacated.¹⁷⁵ In that case, the natural mother, who was married but separated from her husband, informed the natural father, who was not her husband, that she was pregnant, and advised him of her expected due date.¹⁷⁶ The birth mother made arrangements for the child to be adopted by a couple in Minnesota.¹⁷⁷ The prospective adoptive parents traveled to New Hampshire upon the child’s birth and returned to Minnesota with the child and the birth mother, but without complying with ICPC procedures.¹⁷⁸ The adoptive couple filed a subsequent petition for adoption in a Minnesota trial court.¹⁷⁹ The natural father’s name did not appear on the child’s birth certificate and, in his place, the natural mother’s husband signed his consent to the adoption as the “presumptive father.”¹⁸⁰ In New Hampshire, the natural father instituted a paternity action, which was dismissed because the action was not timely filed in accordance with statutory law.¹⁸¹ Through the proceedings, the natural father learned that the child had been adopted in Minnesota.¹⁸² The Minnesota court learned of the paternity action one month after the adoption decree became final.¹⁸³

172. *Id.* The natural mother also argued that Pennsylvania had jurisdiction over the initial custody proceedings and that Florida lacked jurisdiction to enter its own custody decree. *Id.*

173. *Id.* at 1111.

174. 557 N.W.2d 353 (Minn. Ct. App. 1996).

175. *Id.* at 354.

176. *Id.* The natural mother claimed that, upon receiving this information, the natural father advised her to seek an abortion and terminated their relationship. *Id.* The natural father later sought to retain his parental rights, but failed to contribute to prenatal care as required by New Hampshire law. *Id.* at 354-55.

177. *Id.* at 355. The natural mother found the prospective adoptive parents through a licensed Minnesota adoption agency. *Id.* The birth mother and the prospective adoptive parents had their own attorneys facilitate the adoption. *Id.*

178. *Id.*

179. *Id.*

180. *Id.*

181. *Id.* The natural father’s subsequent motions for reconsideration were denied. *Id.*

182. *Id.* The Minnesota court did not know of the paternity action until its dismissal, one month after the adoption became final. *Id.*

183. *Id.*

The Minnesota trial court granted the natural father's motion to vacate the adoption, finding that the adoptive parents and the natural mother violated the ICPC when they transported the child to Minnesota without proper authorization, and that the natural father was entitled to notice of the Minnesota adoption proceeding.¹⁸⁴ The appellate court, reversing the decision of the lower court, first examined the rights of the natural father. The court found that, under the laws of Minnesota, the natural father was not entitled to notice of the Minnesota proceedings.¹⁸⁵ The natural father failed to file an affidavit of his intent to retain parental rights, as required by Minnesota law, when he learned of the child's placement in the state.¹⁸⁶ The court thus concluded that, according to Minnesota law, the natural father's consent was not needed to effectuate the adoption because he was not entitled to notice of the proceedings.¹⁸⁷ Second, the appellate court held that vacating the adoption decree was not an appropriate remedy under the circumstances of the case. The court's reasoning led it to acknowledge that the ICPC does not provide for specific penalties "when a person, rather than an agency, fails to comply with the compact's notice requirements."¹⁸⁸ The court further reasoned that neither the adoptive parents nor their attorney knowingly violated the pre-placement provisions or purposefully ignored New Hampshire laws or ICPC procedures in bad faith.¹⁸⁹

Finally, the Supreme Court of Missouri, in *Baby Girl v. Michael*,¹⁹⁰ held that an ICPC violation does not, per se, permit revocation of the natural parent's consent to the adoption.¹⁹¹ In that case, the prospective adoptive parents traveled from Arkansas to a hospital in Missouri where the intended adoptive child was born the previous day.¹⁹² The hospital social worker obtained the natural mother's consent, and the child was placed in the care of the prospective adoptive parents the

184. *Id.* at 355-56.

185. *Id.* at 357.

186. *Id.*

187. *Id.*

188. *Id.*

189. *Id.* at 357-58. The court expressly adopted the factors set forth in the analysis of the Court of Special Appeals in *In re Adoption/Guardianship No. 3598* in which the court concluded that there was indeed a knowing violation of the ICPC. *Id.* The Minnesota court stated, "Although an analysis of some factors under the Maryland test is arguably favorable to [the natural father], we conclude that overall the factors weigh, more favorably on the side of the birth mother and the adoptive parents." *Id.*

190. 850 S.W.2d 64 (Mo. 1993) (en banc).

191. *Id.* at 71.

192. *Id.* at 66. The Director of Nursing at the hospital where the natural mother gave birth called the prospective adoptive father in Arkansas to inform him that the natural mother was considering adoption for her child. *Id.*

same day.¹⁹³ The couple returned to Arkansas immediately thereafter without complying with the ICPC or substantive Missouri law, which required the couple to file a petition for transfer of custody.¹⁹⁴ An Arkansas court stayed the prospective adoptive parents' adoption petition until they complied with Missouri law.¹⁹⁵ The Missouri trial court subsequently dismissed the natural mother's pending action to revoke her consent finding that the transfer of custody was not at issue and that the natural mother could not simply "change her mind" after executing a valid consent to the adoption.¹⁹⁶ On appeal, the Missouri Supreme Court refused to adopt a per se rule that would permit revocation of consent when there is an ICPC violation, but noted, without elaborating, that revocation of consent "may be a proper remedy or sanction in appropriate circumstances."¹⁹⁷ The court concluded that such matters were more properly decided on a case-by-case basis under the discretion of the trial judge.¹⁹⁸ The court thus remanded the case for further proceedings.¹⁹⁹

The majority of courts, therefore, follow an informal rule that violations of the ICPC will not automatically prevent the granting of a subsequent petition to adopt. This rule apparently reflects the courts' hesitation to allow ICPC procedures to usurp judicial scrutiny of adoption petitions. Instead, the courts will likely consider the impact the violation has on involved parties and whether the ICPC's purpose of providing a safe, suitable placement has been met.

Only one court, the Montana Supreme Court, has revoked the consent of a birth parent as a penalty for the adoptive parents' violation of the ICPC, thus resulting in the dismissal of an adoption petition. In *In re Adoption of T.M.M.*,²⁰⁰ the natural mother of a five-year-old child, residing in Mississippi, executed documents relinquishing her parental rights and consenting to the adoption of her child by a couple from Montana.²⁰¹ The couple transported the child from Mississippi to Montana without making any effort to comply with the ICPC.²⁰² The prospective adoptive parents filed a petition for adop-

193. *Id.*

194. *Id.*

195. *Id.* The prospective adoptive parents never filed the necessary petition. *Id.*

196. *Id.* at 67.

197. *Id.* at 71.

198. *Id.*

199. *Id.*

200. 608 P.2d 130 (Mont. 1980).

201. *Id.* at 131.

202. *Id.*

tion and attached the parental consent documentation.²⁰³ The court entered an ex parte order terminating the natural mother's parental rights.²⁰⁴ One month later, the natural mother appeared in the Montana trial court and filed an action to withdrawal her previously executed consent.²⁰⁵ The trial court dismissed the natural mother's action and she appealed, asserting that the prospective adoptive parents did not comply with ICPC procedures.²⁰⁶ The Supreme Court of Montana found that the couple violated Article III of the ICPC, because they did not provide written notice to the appropriate Montana agency of their intention to bring the child to Montana.²⁰⁷ The court relied on Article IV of the ICPC, which provides for the "suspension or revocation of any license, permit, or other legal authorization" as a sanction for ICPC violations.²⁰⁸ Equating parental "consent" to the prospective adoptive parent's "legal authorization," the court found the ICPC violation as grounds for revocation of the natural mother's consent.²⁰⁹

c. Granting an Adoption Petition Without the Consent of Natural Parents.—The law in Maryland embraces the belief that a child's best interest will be served in the care of a natural parent.²¹⁰ This presumption is supported by what the court has articulated as a biological parent's "natural affection" for his child, which manifests in a desire to care for and raise the child.²¹¹ Accordingly, the Court of Appeals has made an effort to guard the rights of natural parents by warning that the "welfare and best interest of the child must be weighed with

203. *Id.* at 132.

204. *Id.*

205. *Id.*

206. *Id.*

207. *Id.* at 133. The court disagreed with the prospective adoptive parent's contention that the ICPC was only applicable to adoptions facilitated by an agency. *Id.* at 132. Finding the ICPC controlling, the court also disagreed with the couple's argument that the procedures of the ICPC were merely "technical" and of little "consequence" given the fact that they were acting in the child's best interest. *Id.*

208. *Id.* at 134 (quoting Article IV of the ICPC).

209. *Id.*

210. *See* *Ross v. Pick*, 199 Md. 341, 351, 86 A.2d 463, 468 (1952) (explaining that "there is a *prima facie* presumption that the child's welfare will be best subserved in the care and custody of its parents rather than in the custody of others").

211. *See* *Ross v. Hoffman*, 280 Md. 172, 178 n.4, 372 A.2d 582, 587 n.4 (1977) (explaining that a natural parent is preferred because the natural affection "a parent [shows] for a child is as strong and potent as any that springs from human relations and leads to desire and efforts to care properly for and raise the child, which are greater than another would be likely to display" (quoting *Melton v. Connolly*, 219 Md. 184, 188, 148 A.2d 387 (1959))).

great care against every just claim of an objecting parent.”²¹² Courts have exercised particular caution when granting adoption decrees because “[u]nlike awards of custody, . . . adoption decrees cut the child off from the natural parent, who is made a legal stranger to his offspring.”²¹³

The rule at common law upheld the parents’ natural right to the custody of their children.²¹⁴ But, as the court in *Ross v. Hoffman* clarified, this rule is no longer “viable.”²¹⁵ The court indicated that this important natural right cannot be enforced when it appears contrary to a child’s best interest.²¹⁶ In *Ross v. Pick*, the court explained that the principle that the state has an obligation to ensure the welfare of its children is derived from the belief that “a child from the time of birth owes allegiance to the State, and the state in return is obligated to regulate the custody of the child whenever necessary for its welfare.”²¹⁷ This guardian role of the state is codified in Section 5-312 of the Family Law Article, which allows a court to effectuate an adoption without the consent of a natural parent.²¹⁸ The statute stands for the

212. See *Walter v. Gardner*, 221 Md. 280, 284, 157 A.2d 273, 276 (1960) (noting that the Court of Appeals “has indicated that it will not permit trial courts to decree adoptions over the expressed objection of the natural parent or parents, save in very strong cases” (quoting John S. Strahorn, Jr., *Adoption in Maryland*, 7 MD. L. REV. 275, 295 (1943))).

213. *Id.*, 157 A.2d at 275.

214. See *Hoffman*, 280 Md. at 176, 372 A.2d at 586 (stating that “[i]t was the rule of the common law that parents have the natural right to the custody of their children”).

215. *Id.*

216. *Id.* (“[T]he right of a parent to the custody of the child [will] not be enforced inexorably, contrary to the best interest of the child, on the theory of an absolute legal right.” (citing *Ross v. Pick*, 199 Md. 341, 351, 86 A.2d 463, 468 (1952))).

217. *Ross*, 199 Md. at 351, 86 A.2d at 468.

218. MD. CODE ANN., FAM. LAW § 5-312(b) (Supp. 1998). Subsection (b) provides, in pertinent part, that a court can grant an adoption petition, “[w]ithout the consent of the child’s natural parent,” to an individual who has cared for a child for at least six months, if by clear and convincing evidence the court finds that:

(1) it is in the best interest of the child to terminate the natural parent’s rights as to the child;

(2) the child has been out of the custody of the natural parent for at least 1 year;

(3) the child has developed significant feelings toward and emotional ties with the petitioner; and

(4) the natural parent:

(i) has not maintain meaningful contact with the child during the time the petitioner has had custody despite the opportunity to do so; [or]

(ii) has repeatedly failed to contribute to the physical care and support of the child although financially able to do so. . . .

principle that a parent's right to raise his child is not absolute because "a parent has no inherent property right in a child."²¹⁹

Section 5-312 requires a court to find by "clear and convincing evidence" that the child's best interest is served in granting the adoption, and thus terminating the rights of the natural parent.²²⁰ The court has traditionally relied on evidence of unfitness or extraordinary circumstances to rebut the presumption that a child's best interest is served by placing him in the custody of a natural parent.²²¹ The court originally enumerated factors that would constitute "exceptional circumstances" in a disputed custody case.²²² In *In re Adoption/Guardianship No. A91-71A*, the court explicitly adopted those factors, noting that the contested adoption decisions had rested upon similar elements as the contested custody cases.²²³ Factors that may rise to the level of exceptional circumstances and thus sever the right of the natural parent include how long the child has been away from the natural parent and the child's age when a third party assumed care for the child.²²⁴ The court has also contemplated the emotional consequence the change would have on the child and has further looked at the time in which the natural parent sought to reclaim the child.²²⁵ Moreover, the court has found it useful to consider the "nature and strength of the ties" between the third party and the child.²²⁶ Finally, the court has considered the depth and the authenticity of the natural

219. See *Winter v. Director of the Dep't of Pub. Welfare*, 217 Md. 391, 396, 143 A.2d 81, 84 (1958) (discussing the "validity" of legislation that permits the granting of adoptions without the consent of a natural parent).

220. MD. CODE ANN., FAM. LAW § 5-312; see *supra* note 218 (providing text of section 5-312).

221. See *Winter*, 217 Md. at 396, 143 A.2d at 84 (finding that the presumption can be "forfeited by abandonment, unfitness of the parent, or where some exceptional circumstances render the parents' custody of the child detrimental to the best interests of the child").

222. See *Ross v. Hoffman*, 280 Md. 172, 191, 370 A.2d 582, 593 (1977) (articulating the "factors . . . emerg[ing] from . . . prior decisions which may be of probative value in determining the existence of exceptional circumstances").

223. 334 Md. 538, 561-62, 640 A.2d 1085, 1096-97 (1994).

224. *Hoffman*, 280 Md. at 191, 370 A.2d at 593 (stating that the court should consider such circumstances as "the length of the time the child has been away from the biological parent [and] the age of the child when care was assumed by the third party"); see also *King v. Shandrowski*, 218 Md. 38, 44, 145 A.2d 281, 285 (1958) (considering the length of time child had been with the prospective adoptive parents); *Dietrich v. Anderson*, 185 Md. 103, 119, 43 A.2d 186, 193 (1945) (concluding in a custody decision in which child lived with foster parents from 10 months of age through age five that "[i]t is an obvious fact, that ties of blood weaken, and ties of companionship strengthen by lapse of time").

225. *In re Adoption No. A91-71A*, 334 Md. at 562, 640 A.2d at 1097.

226. See *Hoffman*, 280 Md. at 191, 370 A.2d at 593 (stating that the court should consider "the nature and strength of the ties between the child and the third party custodian").

parent's aspiration to have the child, as well as the stability and security of the child's future with the natural parent.²²⁷ The court in *In re Adoption No. A91-71A* explained that these factors "reflect the importance of examining the natural parent's behavior with regard to the child" and "such behavior provided important insight into the parent's character, motivation, or ability to fulfill parental responsibilities."²²⁸

3. *The Court's Reasoning.*—In *In re Adoption/Guardianship No. 3598*, the Court of Appeals reversed the Court of Special Appeals, holding that the trial court's decision to grant a third party petition to adopt over the objection of the natural father was not an abuse of discretion despite violations of the ICPC.²²⁹ Judge Bell, writing for a unanimous court, began the analysis by restating that the standard of review in all adoption cases is "whether the trial court, in making its determination, abused its discretion or made findings of fact that were clearly erroneous."²³⁰ The court explored the principal of judicial discretion, which does not find its authority in a statute or rule.²³¹ Judicial discretion embodies, rather, a "'reasoned decision based on the weighing of various alternatives."²³²

The Court of Appeals criticized the Court of Special Appeals for exceeding its role as a reviewing court by "embark[ing] on an independent fact-finding mission and substitut[ing] its judgment for that of the trial judge."²³³ The court noted that an abuse of discretion is not found where an appellate court could have reached a different decision, but when the holding of a court is not supported by the weight of the facts or logic before it.²³⁴ The court further explained

227. See *In re Adoption No. A91-71A*, 334 Md. at 562, 640 A.2d at 1097 (asserting that the court should consider "the sincerity of the natural parent's desire to rear the child" and "the relative effect upon the child's stability of having one, as opposed to another, or both of the relationships continue"); *Hoffman*, 280 Md. at 191, 370 A.2d at 593 (maintaining that the court should look at "the intensity and genuineness of the parent's desire to have the child [and] the stability and certainty as to the child's future in the custody of the parent").

228. *In re Adoption No. A91-71A*, 334 Md. at 563, 640 A.2d at 1097.

229. *In re Adoption/Guardianship No. 3598*, 347 Md. at 316, 701 A.2d at 316.

230. *Id.* at 311, 701 A.2d at 118 (citing *Petrini v. Petrini*, 336 Md. 453, 468, 648 A.2d 1016, 1023 (1994); *In re Adoption No. 11137*, 106 Md. App. 308, 314, 664 A.2d 443, 446 (1995); *Coffey v. Department of Soc. Servs.*, 41 Md. App. 340, 347-48, 397 A.2d 233, 238 (1979)).

231. *Id.* at 312, 701 A.2d at 118.

232. *Id.* (quoting *Judge v. R & T Constr. Co.*, 68 Md. App. 57, 60, 509 A.2d 1236, 1237 (1986)).

233. *Id.* at 331, 701 A.2d at 128.

234. *Id.* at 312, 701 A.2d at 118 (citing *North v. North*, 102 Md. App. 1, 13, 648 A.2d 1025, 1031 (1994)).

that the duty of the trial court is to weigh conflicting evidence and assess the credibility of witnesses, thereby making trial judges better situated to decide questions within the discretion of the trial court.²³⁵ For these reasons, the Court of Appeals noted that the intermediate appellate court should interfere with the decisions of trial judges only when there is clear error.²³⁶

The court then turned to the purpose for which the ICPC was enacted by its member states.²³⁷ Maryland's participation in the ICPC, the court stated, assures that the child receives "'the maximum opportunity to be placed in a suitable environment.'"²³⁸ The court recognized that mandatory compliance with ICPC procedures helps achieve this purpose.²³⁹ The court noted, however, that there was "no evidence" that the Maryland Compact Administrator would have rejected the placement of Baby S. in Maryland if properly informed of Jerry's objection to the adoption because the procedures set forth in the ICPC do not provide for the withholding of an adoption petition "on the basis that a non-custodial parent is contesting the adoption."²⁴⁰ The court concluded that the ICPC was not created for the purpose of protecting the rights of natural parents, but rather was intended to ensure the safety of interstate placements for children.²⁴¹

The Court of Appeals, specifically addressing the legal rights of the respondent, reasoned that the respondent's efforts to oppose Amy's decision to proceed with the adoption would have been futile.²⁴² The court examined New York law which indicated that an unwed father must "'tak[e] every available avenue to demonstrate that he is willing and able to enter into the fullest possible relationship with his . . . [child].'"²⁴³ The court noted that a natural father must be capable of assuming responsibility for the care and custody of the child within a six-month period immediately preceding the pro-

235. *Id.*

236. *Id.* (citing *Northwestern Nat'l Ins. Co. v. Samuel R. Rosoff, Ltd.*, 195 Md. 421, 436, 73 A.2d 461, 467 (1950)).

237. *Id.* at 314, 701 A.2d at 119 (stating that the purpose for the ICPC was to "facilitat[e] interstate adoption and increas[e] the number of acceptable homes for children in need of placement").

238. *Id.*, 701 A.2d at 120.

239. *Id.* at 315, 701 A.2d at 120 (citing *Bernhardt v. Lutheran Soc. Servs.*, 39 Md. App. 334, 344, 385 A.2d 1197, 1202 (1978)).

240. *Id.* at 317, 701 A.2d at 121.

241. *Id.* at 317-18, 701 A.2d at 121.

242. *Id.* at 318, 701 A.2d at 121.

243. *Id.* at 319, 701 A.2d at 122 (quoting *In re Raquel Marie X*, 559 N.E.2d 418, 425 (N.Y. 1990)).

posed adoptive placement.²⁴⁴ Further, the court found that a biological father's action must be "prompt" and "substantial" in order to invoke constitutional protection.²⁴⁵ The court concluded, therefore, that even if the respondent received notice of the Surrogate Court proceedings, the respondent's consent would probably not have been required to carry out the adoption of Baby Girl S.²⁴⁶

Next, the Court of Appeals discussed the appropriate sanctions for ICPC violations. The court noted that the ICPC does not contemplate sanctions against adoptive parents who violate the ICPC.²⁴⁷ Reaffirming its holding in *In re Adoption No. 10087*, the court emphasized that a violation of the ICPC does not mandate dismissal of an adoption petition.²⁴⁸ Rather, a violation of ICPC placement procedures "indicates the need for a prompt determination of the best interest of [the] child" based on the facts and circumstances presented before the trial judge.²⁴⁹ The court reaffirmed its instruction in *In re Adoption No. 10087* that retroactive compliance be ordered where possible, but stated that "retroactive compliance in this case would be impractical and inequitable, four years having passed since the violation of the ICPC occurred."²⁵⁰

The court revisited the decision of the Montana Supreme Court in *In Matter of Adoption of T.M.M.*,²⁵¹ which the court noted is "the only reported opinion in which an independent adoption was dismissed by a court as a sanction [for] adoptive parents violating the ICPC."²⁵² The court refused to adopt the Montana court's analysis because it did not rely on the best interest of the child standard, and noted that "certainly, the best interest of the child remains the overarching consideration and the needs of the child should not be subordinate to the enforcement of the ICPC."²⁵³ The court acknowledged, however, that a trial court could be presented with circumstances in which dismissal of an adoption petition because of a violation of the ICPC would be

244. *Id.*

245. *See id.* (quoting *In re Raquel Marie X*, 570 N.Y.S.2d at 607).

246. *Id.* (citing *In re Adoption of Emily Ann*, 522 N.Y.S.2d 786 (Fam. Ct. 1987)).

247. *Id.* at 320, 701 A.2d at 122.

248. *Id.* at 321, 701 A.2d at 123 (citing *In re Adoption No. 10087*, 324 Md. 394, 412, 597 A.2d 456, 465 (1991)).

249. *Id.* (alteration in original) (quoting *In re Adoption No. 10087*, 324 Md. at 412, 597 A.2d at 465).

250. *Id.* at 320-31, 701 A.2d at 122-23.

251. 608 P.2d 130 (Mont. 1980).

252. *In re Adoption/Guardianship No. 3598*, 347 Md. at 322, 701 A.2d at 124.

253. *Id.* at 323, 701 A.2d at 124.

an appropriate remedy.²⁵⁴ The court adopted factors initially articulated by the Court of Special Appeals to be considered in making such a determination.²⁵⁵

Finally, the court discussed the "golden rule" in adoption cases, which is the "best interest of the child."²⁵⁶ While the "controlling factor"²⁵⁷ is not the natural parents' interest in raising the child, the court recognized the importance of this "natural and legal right."²⁵⁸ The court noted that in Maryland, a *prima facie* presumption exists that the child's best interest will be served in the custody of its parents.²⁵⁹ The court explained that this presumption can, however, be rebutted when evidence of a parent's unfitness or the indication of exceptional circumstances exist.²⁶⁰ The court reviewed those factors set forth in Section 5-312 of the Family Law Article, which the trial judge must find by "clear and convincing" evidence before effectuating an adoption without the consent of a natural parent, including a finding that it is in the child's best interest.²⁶¹ In addition, the court noted that a judge is prohibited from granting an adoption without the consent of the natural parent "solely because a natural parent has been deprived of custody of the child by the act of the other natural parent."²⁶²

Applying the foregoing reasoning, the court found that trial judge exercised "sound judgment" in finding that the respondent's legal rights were not impaired because he had not taken sufficient action in a timely manner to make himself physically or financially responsible for Baby S. The court further found it within the trial court's discretion to conclude that the Respondent's effort to make meaningful contact with Baby S. went only so far as his interest "in pursuing the legal gamesmanship."²⁶³ In closing, the court remarked

254. *Id.*; see *infra* notes 294-295 and accompanying text (discussing the factors to be considered).

255. *In re Adoption/Guardianship No. 3598*, 347 Md. at 323, 701 A.2d at 124.

256. *Id.* at 323-24, 701 A.2d at 124 (citations omitted).

257. *Id.* at 324, 701 A.2d at 124 (quoting *Petrini v. Petrini* 336 Md. 453, 469-70, 648 A.2d 1016, 1023 (1994)).

258. *Id.* at 324, 701 A.2d at 125 (quoting *In re Jessica M.*, 312 Md. 93, 113, 538 A.2d 305, 315 (1988)).

259. *Id.* at 324-25, 701 A.2d at 125 (citing *Ross v. Pick*, 199 Md. 341, 351, 86 A.2d 463, 468 (1952)).

260. *Id.* at 325, 701 A.2d at 125.

261. *Id.* at 326, 701 A.2d at 125-26.

262. *Id.* at 329, 701 A.2d at 127.

263. *Id.* at 328, 701 A.2d at 126 (quoting *In re Adoption of a Minor*, No. 3598-7-20 (Harford Cty. Cir. Ct. Nov. 9, 1994), *rev'd*, *In re Adoption/Guardianship No. 3598*, 109 Md. App. 475, 675 A.2d 170 (1996), *rev'd*, 347 Md. 295, 701 A.2d 110 (1997)).

that “it is crystalline” that the findings of the trial court were neither clearly erroneous nor an abuse of discretion.²⁶⁴

4. *Analysis.*—The Court of Appeals’s decision in *In re Adoption/Guardianship No. 3598* to uphold the adoption decree over the objection of the natural father and despite violations of the ICPC implicates several important issues. First, in granting the adoption, the court stands firmly behind the best interest of the child standard as the applicable standard in any case in which a child’s welfare is ultimately adjudicated. Second, the court implies that in determining the appropriate course to take in the face of an ICPC violation, it will use an analysis based upon the gravity of the violation, including whether, if the ICPC had been properly implemented, the placement would have been approved. Finally, the court’s action suggests that a violation of ICPC procedures will not have significant relevance in a later petition to adopt before a circuit court in Maryland.

a. *The Best Interest of the Child Standard and the Teachings of In re Adoption No. 10087.*—More than a decade ago, one commentator articulated the tension that arises between the ICPC and the best interest of the child standard that remains appropriate today:

The predicament which the courts face is whether to allow the best interests of the child standard to control when the ICPC has been violated. If the best interests standard controls, then the adoption may be granted despite violation of the ICPC. Alternatively, if the violation of the ICPC is fatal to an otherwise desirable adoption, then a child may be deprived of the only family he has ever known, returned to a natural parent who is marginally capable of providing adequate care, or placed in foster care to await an uncertain future.²⁶⁵

The court in *In re Adoption/Guardianship No. 3598* correctly relied on the best interest of the child in deciding to grant the adoption over the protest of the natural father and despite violations of the ICPC because the best interest of the child standard is unquestionably “firmly entrenched” in Maryland law.²⁶⁶ The Court of Special Appeals

264. *Id.* at 331, 701 A.2d at 128.

265. Hartfield, *supra* note 84, at 319.

266. See *In re Adoption/Guardianship No. 3598*, 347 Md. at 323-26, 701 A.2d at 124-26 (asserting that the best interest of the child standard is to be used in such situations); *Ross v. Hoffman*, 280 Md. 172, 175, 372 A.2d 582, 585 (1977) (stating that the “best interest standard is firmly entrenched in Maryland and is deemed to be of transcendent importance”).

proposed to strictly enforce the ICPC "whenever appropriate" when a child has been denied his or her natural parent because of the violation.²⁶⁷ This would effectively vitiate the discretion of the trial judge to make a determination regarding the best interest of the child before it.²⁶⁸ Consequently, the court's proposition would have done violence to the established notion that what is best for one child is not necessarily best for all children.²⁶⁹

The Court of Special Appeals declared that it was not, in fact, requiring automatic dismissal of adoption petitions for ICPC violations.²⁷⁰ Instead, the court asserted, the trial judge must "make a case-by-case determination" weighing "numerous factors" including whether the ICPC violation impaired the substantive rights of the natural parent.²⁷¹ The decision of the intermediate appellate court, however, demonstrates a different rule. The Court of Special Appeals struck down the trial court's decision to allow the petitioners to adopt Baby S., claiming that the lower court abused its discretion by denying the respondent's motion to dismiss the adoption petition on the grounds of the ICPC violation.²⁷² Under the Court of Special Appeals's analysis, the circuit court should not make such summary dismissals, but rather balance the factors before it. The circuit court opinion extensively balanced the significance of the ICPC violations and the impact of the violations on the rights of respondent as prescribed by the intermediate court.²⁷³ The circuit court, for instance, considered the gravity of Amy's untruths on the ICPC documentation.²⁷⁴ Also, in accordance with the decision in *In re Adoption No. A71-91A*,²⁷⁵ the judge made specific findings of exceptional circum-

267. *In re Adoption/Guardianship No. 3598*, 109 Md. App. 475, 506, 675 A.2d 170, 185 (1996), *rev'd*, 347 Md. 295, 701 A.2d 110 (1997). The Court of Special Appeals did not explain those facts or circumstances that would rise to a level of appropriateness such as to require the child's return to a natural parent. *Id.*

268. *Id.* at 541 (Hollander, J., dissenting) (relying on *In re Adoption No. 10087* to conclude that, "the trial court must have discretion to balance the type and gravity of an ICPC violation with the child's best interests, in light of all the facts and circumstances in the particular case").

269. *Id.* at 519-20 (criticizing the majority for proposing that "as a matter of ICPC policy, that the 'best interest of the child' is actually the best interest of children in general, as opposed to the particular child before the court").

270. *In re Adoption/Guardianship No. 3598*, 109 Md. App. at 503, 675 A.2d at 184.

271. *Id.*

272. *Id.*

273. *In re Adoption of a Minor*, No. 3598-7-20, at 29 (Harford Cty. Cir. Ct. Nov. 9, 1994), *rev'd*, *In re Adoption/Guardianship No. 3598*, 109 Md. App. 475, 675 A.2d 170 (1996), *rev'd*, 347 Md. 295, 701 A.2d 110 (1997).

274. *Id.* at 15.

275. 334 Md. 538, 640 A.2d 1085 (1994).

stances that would rebut the presumption that the interests of Baby Girl S. would be better served in the care of a natural parent.²⁷⁶ The circuit court, furthermore, diligently considered the requirements of Section 5-312 of the Family Law Article, which governs the power of courts to grant adoptions when the consent of a natural parent is withheld.²⁷⁷ Finally, the circuit court adhered to the statutory requirement of appointing an attorney to represent the interests of Baby S., as well as a social worker to aid in the decision making process.²⁷⁸ Notwithstanding the circuit court's application of this balancing test, the Court of Special Appeals declared that the circuit court's findings of fact were clearly erroneous.²⁷⁹ The Court of Appeals correctly disagreed with intermediate appellate court's reliance on facts in the record that were contrary the findings of the trial court in an attempt to overturn the lower court's decision under the guise of abuse of discretion.

The Court of Special Appeals relied on *In re Adoption No. 10087*²⁸⁰ to make its case for effective revocation of the best interest of the child standard when a natural parent contends an ICPC violation has impaired his substantive rights.²⁸¹ The intermediate court found that *In re Adoption No. 10087* was not determinative as to the remedy for all ICPC violations because the Court of Appeals was not confronted with a natural parent contesting the adoption.²⁸² The Court of Special Appeals took note of the Court of Appeals's reaction in *In re Adoption No. 10087* to the analysis set forth in *In re Adoption of T.M.M.*,²⁸³ to which the Court of Appeals remarked that such a summary dismissal would be inappropriate where there were no natural parents to whom the child could be returned.²⁸⁴ The Court of Special Appeals, presumably, interpreted this observation to mean that dismissal is appropriate where a natural parent is willing to assume care and custody of the

276. *In re Adoption of a Minor, No. 3598-7-20*, at 39.

277. *Id.* at 26.

278. *Id.* at 4, 27.

279. *In re Adoption/Guardianship No. 3598*, 109 Md. App. 475, 511, 675 A.2d 170, 187 (1996) (asserting that "the trial court erred in finding that it was in the best interests of the child to terminate appellant's parental rights"), *rev'd*, 347 Md. 295, 701 A.2d 110 (1997).

280. 324 Md. 394, 597 A.2d 456 (1991).

281. *In re Adoption/Guardianship No. 3598*, 109 Md. App. at 496-99, 675 A.2d at 188-82 (discussing the conclusions made by the Court of Appeals in *In re Adoption No. 10087* when faced with an ICPC violation).

282. *Id.* at 498-99, 675 A.2d at 181 (finding that "[t]he factual situation in *In re Adoption No. 10087* is distinguishable from this case").

283. *Id.* at 495-96, 675 A.2d at 180; *see supra* notes 199-208 and accompanying text (discussing the analysis in *In re Adoption of T.M.M.*).

284. *In re Adoption/Guardianship No. 3598*, 109 Md. App. at 498-99, 675 A.2d at 181.

child. Ultimately, the intermediate court relied on the warning in *In re Adoption No. 10087* that the Court of Appeals would not tolerate adoptive parents "illegally remov[ing] a child from another state and hold[ing] it in Maryland until a sufficient time elapse[d] so that the child's welfare dictate[d] adoption."²⁸⁵

The Court of Special Appeals failed to properly build on the foundation provided by the decision in *In re Adoption No. 10087*. Although the Court of Special Appeals may have been correct in its literal interpretation of *In re Adoption No. 10087*, the case stands for the proposition that the trial judge is vested with the discretion to weigh ICPC violations and that such violations will not provide for a perfunctory dismissal of subsequent petitions to adopt.²⁸⁶ Per se dismissal is not appropriate because, as the court in *In re Adoption No. 10087* was quick to remind the courts, the "'golden rule'" in adoption cases "is and has always been, the best interest of the child."²⁸⁷ Further, dismissal is improper because the circuit court, not the state compact office, is the correct forum for conclusive determination of a child's best interest.²⁸⁸

In re Adoption No. 10087 provided further instruction that ICPC violations are appropriately weighed in terms of the best interest of the child.²⁸⁹ The Court of Appeals in that case had the opportunity to strengthen the ICPC when it considered the analysis set forth in *In re Adoption of T.M.M.*²⁹⁰ The court, however, was unwilling to accept any analysis that did not put the best interest of the child above all.²⁹¹ The Court of Appeals in *In re Adoption No. 10087* explained that the best interest of the child must be considered to assure the needs of the child are met.²⁹² Moreover, although the court at that time was not faced with adjudicating the rights of a natural parent, it logically follows that lack of consent of a natural parent is simply a factor that

285. See *id.* (quoting *In re Adoption No. 10087*, 324 Md. at 414, 597 A.2d at 466).

286. See *In re Adoption No. 10087*, 324 Md. at 412, 597 A.2d at 465 (holding that an ICPC violation does "not mandate dismissal; rather it indicates the need for a prompt determination of the best interest of this child").

287. *Id.* at 411, 597 A.2d at 464 (quoting *In re Lynn M.*, 312 Md. 461, 463, 340 A.2d 799, 800 (1988)).

288. *Id.* at 412, 597 A.2d at 465.

289. See *id.* at 411, 597 A.2d at 465 (announcing that "[t]he appropriate forum for final determination of the best interest of the child is [not the compact office but] the adoption proceeding in the circuit court. . .").

290. See *id.* at 412, 597 A.2d at 465 (considering the decision of the Montana court).

291. *Id.*

292. See *id.* at 414, 597 A.2d at 466 (finding that "[w]here the welfare of a child is at stake . . . the court should . . . evaluate the best interest of the child and consider whether some action should be taken to assure the child's needs will be met").

should be weighed in the best interest analysis. The rule adopted by the Court of Special Appeals, which would direct the circuit court judge to dismiss an adoption petition where an ICPC violation has implicated the substantive rights of a natural parent, without considering the child's best interest is, therefore, a contradiction of the decision in *In re Adoption No. 10087*.²⁹³ The *In re Adoption No. 10087* court could not have been more poignant when it said, "[w]here the welfare of a child is at stake, the court should not, like Pontius Pilate, wash its hands of the matter."²⁹⁴

b. Articulating the Appropriate Analysis to be Applied to ICPC Violations.—In *In re Adoption/Guardianship No. 3598*, the Court of Appeals acknowledged that the dismissal of an adoption petition based on a violation of the ICPC might be warranted where appropriate circumstances are presented before the trial court.²⁹⁵ The court adopted those factors articulated by the Court of Special Appeals that a circuit court should consider in making such a determination.²⁹⁶ The court failed, however, to explain how these factors should be weighed in terms of the best interest of the child analysis. The language of the ICPC provides no further insight because it neither expressly contemplates penalties in the context of an independent adoption nor speaks to the best interest of the child. Thus, it is necessary to examine how the court made its determination to grant the adoption decree despite violations of the ICPC and compare the decision to cases in other jurisdictions.

The Court of Appeals in this case was faced with more than a technical violation of ICPC procedures. The court recognized that

293. See *In re Adoption/Guardianship No. 3598*, 109 Md. App. 475, 503-06, 675 A.2d 184-85 (1996) (explaining that although a trial court should not dismiss adoption petitions for only a "*de minimis*" violation of the ICPC, the motion to dismiss was appropriate in this case where Jerry had been "deprived" of Baby S. because of the violation), *rev'd*, 347 Md. 295, 701 A.2d 110 (1997).

294. *In re Adoption No. 10087*, 324 Md. at 414, 597 A.2d at 466.

295. *In re Adoption/Guardianship No. 3598*, 347 Md. at 323, 701 A.2d at 124.

296. *Id.* The factors set out by the Court of Special Appeals are:

whether the violation (1) was knowingly committed by the adoptive parents or their attorney; (2) impaired the rights of a natural parent; (3) was more than a mere procedural technicality that adversely affected both the receiving and sending state's ability to determine the best interests of the child; (4) impeded the sending state's jurisdiction to determine the best interests of their children; (5) circumvented a sending state's laws in order to effectuate the adoption; and (6) was made to enhance the adoptive parent's ability to form emotional ties with the child in order to dictate adoption in receiving state's courts.

the respondent's substantive rights were implicated and, like the trial court, appropriately gave deference to considering those rights.²⁹⁷

First, the Court of Appeals inquired as to whether the petitioners would have been granted ICPC approval.²⁹⁸ The petitioners satisfied the ICPC's ultimate goal of providing safe placements for children across state lines.²⁹⁹ The petitioners were licensed foster care parents, providing care for nine children for periods of one night to eight months.³⁰⁰ A recent home study conducted by an authorized agency had determined that the petitioners and their home offered a suitable environment.³⁰¹ The court further found it credible that the adoptive mother waited in New York for two weeks for compact approval.³⁰² The completed New York application was sent to the Maryland compact office with a note to call the petitioners with verbal approval.³⁰³ Considering these facts, the court concluded that the trial court did not make findings of fact that were clearly erroneous or abuse its discretion in making the determination that the best interest of Baby S. had been met and the goals of the ICPC had been achieved.³⁰⁴

Second, the court inquired into whether the ICPC violation impaired respondent's legal rights.³⁰⁵ This inquiry led the court to reexamine the New York Surrogate Court proceeding to which the respondent did not receive notice.³⁰⁶ The court questioned whether the respondent would have been successful in objecting to the adoption.³⁰⁷ According to New York law, the respondent's consent would not have been needed to effectuate this adoption because the respondent failed to contribute to Amy's prenatal care, and he did not make a plan to raise his daughter six months preceding the child's adoptive

297. *Id.* at 316-19, 701 A.2d 110, 121-22 (discussing the protections afforded respondent's legal rights); see *In re Adoption of a Minor*, No. 3598-7-20, at 29 (Harford Cty. Cir. Ct. Nov. 9, 1994) (stating that "[h]ad the only issue in this case been the question of [the] best interests of the child, we would have decided the matter from the bench the day the trial was completed. . . . It is the concern for [the respondent's] legal rights . . . that has caused us to struggle with this matter"), *rev'd*, *In re Adoption/Guardianship No. 3598*, 109 Md. App. 475, 675 A.2d 170 (1996), *rev'd*, 347 Md. 295, 701 A.2d 110 (1997).

298. See *In re Adoption/Guardianship No. 3598*, 347 Md. at 316, 701 A.2d at 120-21 (concluding "[t]hat the interest may well be found to have been met along with the purpose and goals of the ICPC to have been achieved").

299. *Id.*

300. *Id.* at 303 n.3, 701 A.2d at 114 n.3.

301. *Id.* at 316, 701 A.2d at 121.

302. *Id.*

303. *Id.*

304. *Id.* at 330-31, 701 A.2d at 127-28.

305. *Id.* at 316-19, 701 A.2d at 121-22.

306. *Id.* at 318, 701 A.2d at 121.

307. *Id.*

placement that would have enabled him to assume full responsibility.³⁰⁸ Amy's failure to identify the respondent as the child's natural father did not, therefore, diminish the respondent's legal right to raise his child.³⁰⁹ Respondent, not taking swift action to assume his parental responsibility, would not have been afforded the protection of the law.³¹⁰

Thus, the analysis of the Court of Appeals suggests an informal analysis for determining the appropriate course to take in the face of an ICPC violation. The court implies that a circuit court should consider the gravity of the violation within the best interest analysis, including whether, if the ICPC had been properly implemented, the placement would have been approved. When the substantive rights of a party are indicated, the circuit court should consider whether the party was afforded adequate protection of the law.

The majority of courts in other jurisdictions have likewise indicated that ICPC violations will not automatically mandate dismissal of a subsequent petition to adopt. Courts have demonstrated analysis similar to the Court of Appeals when ICPC violations are indicated in adoption proceedings. In the three New York decisions reported at the trial level, for instance, the courts determined that while technical compliance with the ICPC was lacking, the adoptive placement fulfilled the goals of the ICPC and, thus, the placement would have been granted.³¹¹ In *In re Adoption of Baby Boy M.G.*,³¹² the analysis of the New York trial court's decision treads even further onto the ICPC's significance for adoption petitions. ICPC approval was denied in this case by the Tennessee compact office because state law forbade adoptions facilitated by an attorney. The New York court was unmoved by the failure to gain ICPC approval in Tennessee because New York law had, in all other respects, been complied with.³¹³ Of course, in these

308. *Id.* at 318-19, 701 A.2d at 121.

309. *Id.* at 319, 701 A.2d at 122.

310. *Id.* at 318-19, 701 A.2d at 121-22. The Court of Appeals found this attitude toward parental rights to be in line with the Supreme Court decision of *Lehr v. Robertson*, 463 U.S. 248 (1983). *Id.* at 324 n.16, 701 A.2d at 124 n.16. In *Lehr*, the Supreme Court explained that the biological connection between a natural father and his child is significant only because it affords the biological father a unique opportunity to form a relationship with his child. *Lehr*, 463 U.S. at 262. If, the Court explained, the natural father fails to take advantage of this opportunity by accepting the responsibility of parenthood, "the Federal Constitution will not automatically compel a state to listen to his opinion of where the child's best interests lie." *Id.*

311. See *supra* notes 161-162 and accompanying text (discussing the New York trial court decisions that declined to dismiss the adoption petitions for ICPC violations).

312. 515 N.Y.S.2d 198 (Sur. Ct. 1987).

313. *Id.* at 201.

decisions, the courts acknowledged that the natural parents could no longer be found and that the children had known no other parents other than their adoptive families.³¹⁴ Thus, to dismiss the adoption petitions would have been against the best interests of the children before these courts.

In re Adoption of T.M.M.,³¹⁵ the case in which the Montana Supreme Court did not discuss the best interest of the child when dismissing an adoption petition based on violations of the ICPC, was also not so far off from position of other courts.³¹⁶ The court, rebuking the adoptive parents for their complete failure to comply with the ICPC before they transported the child from Mississippi to Montana, dismissed the adoption proceeding on the grounds of the ICPC violation.³¹⁷ The facts of the case, however, were significantly different than other cases implicating the ICPC. Unlike other cases in which the child concerned was an infant, the child in the Montana case was five years old when natural mother executed her consent to adoption.³¹⁸ That is, the adoptive parents were not the only parents the child had ever known. Also, the natural mother was not afforded a hearing at which to relinquish her consent, but rather, her consent was waived in a document witnessed and notarized by a relative of the adoptive parents and a resident of Mississippi.³¹⁹ Perhaps, then, the creative maneuver of revoking parental consent by equating it with "legal authorization" allowed the court to escape from an uncomfortable set of facts.³²⁰

Particularly in cases in which the rights of a natural parent are concerned, courts are reluctant to use ICPC violations as the means by which to dismiss adoption petitions.³²¹ Courts, instead, consider the gravity of the violation and apply their substantive law to determine if the natural parent's rights were adequately protected. The Supreme

314. See *supra* notes 161-162 and accompanying text (indicating that in all three decisions the natural parents could not longer be located).

315. 608 P.2d 130 (Mont. 1980).

316. See *id.* at 130-34 (relying on the language of the ICPC rather than applying the best interest of the child standard); see *supra* notes 199-208 and accompanying text (discussing *In re Adoption of T.M.M.*).

317. *In re Adoption of T.M.M.*, 608 P.2d at 134.

318. *Id.* at 131.

319. *Id.*

320. See *supra* notes 207-208 and accompanying text (explaining how the court equated parental consent with the "legal authorization" provided for in the ICPC).

321. See *supra* notes 162-198 and accompanying text (discussing *In re Adoption of C.L.W.*, *In re C.M.A.*, and *Baby Girl v. Michael* in which the rights of a natural parent were implicated).

Court of Missouri in *Baby Girl v. Michael*³²² concluded that an ICPC violation may provide a basis for the dismissal of an adoption petition, but, like the Court of Appeals in *In re Adoption/Guardianship No. 3598*, left the decision to the discretion of the trial judge.³²³ The Missouri court relied, rather, on its substantive law that required the prospective adoptive parents to obtain a transfer of custody order to hold that the subsequent custody actions were null.³²⁴

Likewise, in Minnesota, the appellate court in *In re C.M.A.*³²⁵ held that the ICPC could not provide the basis by which to vacate an adoption decree.³²⁶ The court found that the ICPC violation did not injure the natural father's parental rights although the birth mother did not identify the natural father and he did not execute his consent.³²⁷ Under New Hampshire law, the natural father's consent would not have been needed because his paternity action was dismissed for failure to timely file.³²⁸ Minnesota relied on its substantive law, not the ICPC, to determine that the natural father was not entitled to notice because his consent would not have been needed to effectuate the adoption.³²⁹

Finally, even faced with a bad faith violation of the ICPC, courts will be unlikely to mandate dismissal of subsequent adoption petitions because it would erode the court's role in adjudicating the interests of the child in such proceedings. In *In re Adoption of C.L.W.*,³³⁰ for instance, the prospective adoptive parents made no effort to comply with the ICPC and left Pennsylvania even after being notified by the natural mother's attorney that she wanted to relinquish her consent.³³¹ The court determined that the failure to obtain ICPC approval was not injurious because the compact office "made the same determination concerning the best interests of the child as it would have been required to make" prior to the placement.³³² On the issue

322. 850 S.W.2d 64 (Mo. 1993) (en banc).

323. See *id.* at 71; *In re Adoption/Guardianship No. 3598*, 347 Md. at 331, 701 A.2d at 128 (stating that in regard to an adoption petition, "it is the trial judge's role to assess the evidence and the credibility of witnesses, and to resolve the conflicting evidence").

324. See *Michael*, 850 S.W.2d at 68.

325. 557 N.W.2d 353 (Minn. Ct. App. 1996).

326. *Id.* at 359. The court stated that the "unknowing violation does not provide an adequate basis for vacating the decree." *Id.*

327. *Id.* at 358-59. The nondisclosure of the father's identity "may have created confusion in the district court, but his identity was not material to the proceedings." *Id.* at 359.

328. *Id.* at 356.

329. *Id.* at 356-58.

330. 467 So. 2d 1106 (Fla. Dist. Ct. App. 1985).

331. *Id.* at 1108.

332. *Id.* at 1111.

of consent, the court saw no reason not to apply Florida substantive law to the adjudication the natural mother's legal consent because she was on notice that Florida law would apply to the adoption proceedings.³³³

Maryland and other jurisdictions, therefore, appear to be in the majority on the question of the implication of ICPC violations on subsequent petitions to adopt. Courts will continue to determine the best interests of the child by examining such factors as the harm caused by the ICPC violations, including whether the natural parents can be located or whether the adoptive parents are the only family the child has ever known.³³⁴ Courts suggest they will also determine whether, if proper procedures had been followed, ICPC approval would have been granted.³³⁵ Finally, even where the legal rights of a natural parent are concerned, courts will be unwilling to allow ICPC violations to provide for perfunctory dismissal without consideration of the child's best interest.³³⁶ Instead, courts will apply the substantive law of their state to ensure that a natural parent's rights were protected.³³⁷

c. Policy Considerations.—In determining that an ICPC violation does not automatically mandate dismissal of an adoption petition, even when the substantive rights of a natural parent are implicated, the Court of Appeals preserved the power of the circuit courts to balance the interests before them.³³⁸ Any abrogation of a

333. *Id.*

334. See, e.g., *In re Adoption No. 10087*, 324 Md. 394, 412, 597 A.2d 456, 465 (1991) (explaining the court's unwillingness to require that a child's welfare be left uncertain or that the child be placed in the supervision of the sending or receiving state when no one has come forward for custody of the child); *In re Adoption of Calynn, M.G.*, 523 N.Y.S.2d 729, 730, (Sur. Ct. 1987) (allowing the finalization of the adoption petition where natural mother could not be located "rather than leaving this child's future unsettled").

335. See, e.g., *In re Adoption of Baby "E,"* 427 N.Y.S.2d 705, 707, 711 (Fam. Ct. 1980) (approving adoption petition despite ICPC violations because the "essential ingredients" of the ICPC had been met).

336. See *supra* notes 162-198 and accompanying text (discussing *In re Adoption of C.L.W.*, *In re C.M.A.*, and *Baby Girl v. Michael* in which the rights of a natural parent were implicated).

337. See, e.g., *In re Adoption of C.L.W.*, 467 So. 2d at 1111 (finding no reason not to apply state substantive law, as courts generally do, in the instant case especially when considering the whether the natural mother properly executed consent to the adoptive parents); *In re C.M.A.*, 557 N.W.2d 353, 357 (Minn. Ct. App. 1996) (applying the substantive law of Minnesota to conclude that the natural father was not entitled to notice of the adoption proceedings).

338. See *supra* notes 229-235 and accompanying text (discussing the discretionary authority vested in the trial courts).

trial court's discretion to make a determination of the best interest of a child would contradict the established law in Maryland.³³⁹

The holding in this case moves the court toward acknowledging that the ICPC is not the appropriate mechanism upon which to deny a subsequent adoption petition.³⁴⁰ The language of the ICPC does not mention adoption or adoption proceedings, but rather speaks only to the interstate "placements" of children.³⁴¹ Of further note is that the Maryland adoption statutes do not contain language creating a connection between the ICPC and subsequent adoption petitions, thus suggesting a lack of legislative intent to do so.³⁴² The ICPC's relevance in adoption proceedings is also marked by the lack of a penalty provision for adoptive parents or their attorneys.³⁴³ Finally, the ICPC does not contemplate the rights of any party.³⁴⁴ The procedures are only intended to protect the safety of the children placed across state lines.³⁴⁵

Courts faced with an ICPC violation, especially where an agency is not involved in the placement, have minimal guidance on which to rely. Courts undoubtedly recognize that dismissing adoption petitions and returning children to a natural parent unprepared to care for the child, or, in their absence, turning children over to the care of the state is not a satisfactory remedy.³⁴⁶ Although at least one authority has argued that such action would deter adoptive parents and attor-

339. See *supra* notes 120-125 and accompanying text (explaining that the best interest of the child standard has long been recognized as the prevailing consideration in all proceedings involving children's welfare).

340. See *In re Adoption No. 10087*, 324 Md. 394, 430, 597, A.2d 456, 474 (1991) (Eldridge, J., dissenting) (arguing that an ICPC violation is irrelevant in a subsequent adoption proceeding).

341. GUIDE TO THE INTERSTATE COMPACT ON THE PLACEMENT OF CHILDREN, *supra* note 303, at 11-15.

342. MD. CODE ANN., FAM. LAW §§ 5-301 to -415 (1991 & Supp. 1998); see *In re Adoption No. 10087*, 324 Md. at 434, 597 A.2d at 476 (Eldridge, J., dissenting) (noting that the ICPC is not referenced in the Maryland adoption statutes).

343. GUIDE TO THE INTERSTATE COMPACT ON THE PLACEMENT OF CHILDREN, *supra* note 303, at 11-15; see *In re Adoption/Guardianship No. 3598*, 347 Md. at 320, 701, A.2d at 122 (observing that section 5-605 of the Maryland code "does not provide sanctions . . . , that could or should be imposed on adoptive parents who violated the ICPC. . .").

344. GUIDE TO THE INTERSTATE COMPACT ON THE PLACEMENT OF CHILDREN, *supra* note 303, at 11-15.

345. See *In re Adoption/Guardianship No. 3598*, 347 Md. at 317, 701, A.2d at 121 (asserting "the ICPC was not designed to protect the rights of birth parents; instead, its is designed to ensure that placements for children across state lines are safe. . .").

346. See *supra* note 333 and accompanying text.

neys from thwarting the ICPC,³⁴⁷ children should not be made a "martyr" for the ICPC.³⁴⁸ The Court of Appeals has likewise given limited instruction to the circuit courts, except to explain that retroactive compliance with the ICPC should be sought whenever practical.³⁴⁹ However, in cases in which a Maryland circuit court finds a bad faith violation or circumstances that are particularly egregious, the court should be able to punish the perpetrators. Imposing sanctions on parties found to be at fault may serve as an appropriate course of action for Maryland circuit courts.³⁵⁰ For example, the New York court in *Adoption of Calynn, M.G.* saw fit to reduce attorney's fees for failure to comply with the ICPC.³⁵¹ Furthermore, ICPC violators, it has been argued, could be held amenable to the child protection laws of Maryland.³⁵² The violators could be sanctioned under section 5-521 of the Family Law Article.³⁵³

5. *Conclusion.*—The Court of Appeals properly granted the adoption petition over the natural father's objection and despite violations of the ICPC. The court correctly concluded that ICPC approval would have been granted and that the father would not have been successful in his attempt to stop the adoption. The court's ruling fortifies the best interest of the child standard as the prevailing concern in all instances in which the welfare of a child is adjudicated, even those implicating the ICPC.

347. See COMPACT ADMINISTRATORS' MANUAL 3.152 (Secretariat Opinion No. 60) (1993) (asserting that "[i]t would not take many dismissals of adoption petitions and removal of children from homes in violation of placement laws to stop these efforts at evasion").

348. See *In re Adoption/Guardianship No. 3598*, 109 Md. App. 475, 525, 675 A.2d 170, 195 (1996) (Hollander, J., dissenting) (stating that the trial court judge had "reasonably concluded that Baby Girl S. should not be made a martyr for the ICPC").

349. See *In re Adoption/Guardianship No. 3598*, 347 Md. at 321, 701 A.2d at 123 (explaining that in *In re Adoption No. 10087* "[w]e commented that the most appropriate sanction for an ICPC violation is retroactive compliance"). The court in *In re Adoption No. 10087* recognized the problem confronted by circuit courts. 324 Md. 394, 414, 597 A.2d 456, 466 (1991). The court invited the Maryland legislature "to address the concerns raised by the limited ability to enforce the ICPC in private adoptions." *Id.*

350. The Court of Special Appeals in *In re Adoption/Guardianship No. 3598* denied the attorney's fees of the adoptive parent's attorney. 109 Md. App. at 510, 675 A.2d at 187. Reversing the decision, the Court of Appeals did not address the issue. *In re Adoption/Guardianship No. 3598*, 347 Md. 295, 701 A.2d 110 (1997).

351. See *In re Adoption of Calynn, M.G.*, 523 N.Y.S.2d 729, 731 (1987) (reducing attorney's fees of the adoptive parents as provided for by New York law because "the bar should recognize that repeated circumvention of the court's rules cannot persist without sanctions being applied").

352. See McDermott, *supra* note 113, at D-03 n.2 (arguing that section 5-521 makes it a misdemeanor for anyone to place a child illegally in the state).

353. MD. CODE ANN., FAM. LAW § 5-521 (1999).

The holding further directs the circuit courts not to automatically dismiss adoption petitions for violations of the ICPC. The circuit courts should, instead, consider the seriousness of the violation within the best interest analysis, including whether, if the ICPC had been properly implemented, the placement would have been approved. In cases in which the legal rights of a party are indicated, the circuit court should consider whether the party was afforded adequate protection of the law.

The court in *In re Adoption/Guardianship No. 3598* has brought the court closer to stating that the ICPC is not the appropriate mechanism upon which to deny a subsequent adoption petition. Although ICPC procedures play an important role in protecting the lives of children, the ICPC was not intended to terminate adoption proceedings.

CONNIE E. EISEMAN

IX. HEALTH CARE

A. *Maryland Properly Limits Decision and Reads Provision Under the Maryland Confidentiality of Medical Records Act as Only Allowing Disclosure of Medical Records by the Provider in Possession of the Records*

In *Warner v. Lerner*,¹ the Court of Appeals concluded that a physician with a medical malpractice suit pending against him could not obtain and use the medical records of a patient of another medical provider, if that patient is in no way involved in the malpractice claim.² In so doing, the court reversed the decision of the Court of Special Appeals³ and determined that section 4-305(b)(1)(iii) of the Maryland Confidentiality of Medical Records Act (Records Act)⁴ had no application under the facts of the case.⁵ The court held that the statute only allowed the health care provider *in possession* of the medical records the discretion to disclose those records; because the physician in *Warner* was not in possession of the records, the statute's allowance for disclosure did not apply to him.⁶ The court declined to decide whether section 4-305(b)(1)(iii)⁷ should be read to allow the provider in possession of the medical records to disclose to a second provider's attorney the medical record of an individual who is not a patient of the second provider and is uninvolved in the claim against the second provider.⁸ As a result, the court's holding was a narrow one. By limiting its decision, the Court of Appeals correctly left it to

1. 348 Md. 733, 705 A.2d 1169 (1998).

2. *See id.* at 739-40, 705 A.2d at 1174-75.

3. *Warner v. Lerner*, 115 Md. App. 428, 693 A.2d 394 (1997), *rev'd*, 348 Md. 733, 705 A.2d 1169 (1998).

4. MD. CODE ANN., HEALTH-GEN. I §§ 4-301 to -309 (1994 & Supp. 1998). Section 4-305(b)(1) of the Records Act provides:

(b) *Permitted Disclosure*.—A health care provider may disclose a medical record without the authorization of a person in interest:

(1) (i) To the provider's authorized employees, agents, medical staff, medical students, or consultants for the sole purpose of offering, providing, evaluating, or seeking payment for health care to patients or recipients by the provider;

(ii) To the provider's legal counsel regarding only the information in the medical record that relates to the subject matter of the representation; or

(iii) To any provider's insurer or legal counsel, or the authorized employees or agents of a provider's insurer or legal counsel, for the sole purpose of handling a potential or actual claim against any provider

Id. § 4-305(b)(1).

5. *Warner*, 348 Md. at 739-40, 705 A.2d at 1173.

6. *Id.*

7. *See supra* note 4.

8. *See Warner*, 348 Md. at 740 n.3, 705 A.2d at 1173 n.3 (noting "we need not decide in this case whether § 4-305(b)(1)(iii) should be read to permit [a provider in possession of medical records] to disclose to a provider's insurer or attorney the medical record of someone who was not a patient of the provider").

the legislature to make any necessary changes to the broad language of the statute.

1. *The Case.*—William S. Warner was a patient of Dr. Horst Schirmer, a urologist with privileges at Union Memorial Hospital.⁹ In 1992, Warner was treated by Dr. Schirmer for urinary/genito problems.¹⁰ During the course of that treatment, Warner disclosed personal information to Dr. Schirmer with the understanding that the information would remain confidential.¹¹ While not expressly averred by the parties, the Court of Appeals found that the medical records dealing with Warner's treatment were incorporated into the medical records of Union Memorial Hospital.¹²

Unrelated to Warner's treatment, Leo Kelly, Jr. sued Dr. Brad Lerner, a urologist with privileges at Union Memorial Hospital,¹³ for medical malpractice.¹⁴ By joint agreement, Mr. Kelly and Dr. Lerner submitted the claim to binding arbitration.¹⁵ Mr. Kelly retained Dr. Schirmer as an expert witness to testify that Dr. Lerner breached applicable standards of care by performing a certain urological procedure on Mr. Kelly.¹⁶ In an effort to discredit Dr. Schirmer's testimony

9. *Id.* at 735, 705 A.2d at 1170-71. The court noted that the appeal arose from the granting of a motion to dismiss; therefore the court had to "assume as fact the well-pleaded material allegations in the complaint and any reasonable inferences that may be drawn from them." *Id.*, 705 A.2d at 1170 (citing *Flaherty v. Weinberg*, 303 Md. 116, 135-36, 492 A.2d 618, 628 (1985)). Although the complaint did not allege exactly how Dr. Lerner obtained the pathology report, the court noted:

It seems implicit from the argument made both in the circuit court and in this Court that, rather than physically rummaging through the actual records, Lerner obtained the report through the Union Memorial Hospital computer system. From the allegation that he obtained the report "wrongfully" and "in violation of [Maryland Code, §§ 4-301 through 4-309 of the Health-General Article]," it is also implicitly alleged that he obtained it without requesting or receiving permission from Union Memorial, from Dr. Schirmer, or from Mr. Warner.

Id. at 737, 705 A.2d at 1171.

10. *Id.* at 735, 705 A.2d at 1170.

11. *Id.*, 705 A.2d at 1170-71. The data given to Dr. Schirmer included "personal and private data referable to the Plaintiff's urinary/genito health." Joint Record Extract at E.1, *Warner v. Lerner*, 115 Md. App. 428, 693 A.2d 394 (1997), *rev'd*, 348 Md. 733, 705 A.2d 1169 (1998) (No. 1368).

12. *Warner*, 348 Md. at 735, 705 A.2d at 1171.

13. *Id.*, 705 A.2d at 1170.

14. *Warner v. Lerner*, 115 Md. App. 428, 429, 693 A.2d 394, 394 (1997), *rev'd*, 348 Md. 733, 705 A.2d 1169 (1998).

15. *Warner*, 348 Md. at 735 & n.2, 705 A.2d at 1171 & n.2. Retired Judge Hilary Caplan heard the case. *Id.* at 735, 705 A.2d at 1171.

16. *Warner*, 115 Md. App. at 429, 693 A.2d at 394. Mr. Kelly was a patient of both Dr. Lerner and Dr. Schirmer. *Warner*, 348 Md. at 735, 705 A.2d at 1171. The operation performed on Mr. Kelly by Dr. Lerner is called a transurethral resection of the prostate (TURP). *Warner*, 115 Md. App. at 429, 693 A.2d at 394. Dr. Schirmer gave deposition

at the arbitration hearing, Dr. Lerner obtained from the medical records of Union Memorial Hospital a copy of a pathology report of an operation Dr. Schirmer performed.¹⁷ The pathology report Dr. Lerner obtained was that of Mr. Warner.¹⁸

At the arbitration proceeding, cross-examination of Dr. Schirmer involved public disclosure of Mr. Warner's urological history and treatment; Mr. Warner's confidential medical records were made public without his authorization.¹⁹

Following the arbitration hearing, Mr. Warner petitioned the Circuit Court of Baltimore City for relief from Dr. Lerner's alleged violation of the Records Act.²⁰ According to Mr. Warner's theory, Dr. Lerner willfully violated the Records Act, section 4-302, by obtaining Mr. Warner's urological records from Union Memorial Hospital's collection of medical records,²¹ and Mr. Warner was damaged when the confidential information was intentionally made public by Dr. Lerner at the arbitration hearing.²² Dr. Lerner filed a motion to dismiss the complaint, claiming that: (1) the complaint failed to show a statutory violation; (2) that the disclosure was permissible under sections 4-305 and 4-309; and (3) the disclosure during the arbitration proceeding was absolutely privileged.²³

The circuit court granted the motion to dismiss, noting that the language used by the legislature in section 4-305(b)(1)(iii) of the

testimony that the "performance of a TURP on a patient with acute or chronic prostatitis constituted malpractice." Brief of Appellee at 2, *Warner v. Lerner*, 348 Md. 733, 705 A.2d 1169 (1998) (No. 69). Dr. Schirmer further testified that according to Mr. Kelly's pathological report, the TURP procedure should not have been performed. *Id.*

17. *Warner*, 348 Md. at 736-37, 705 A.2d at 1171.

18. *Id.* at 737, 705 A.2d at 1171. Mr. Warner's pathology report was practically identical to Mr. Kelly's. Brief of Appellee at 2, *Warner* (No. 69). The report showed that Mr. Warner also had acute and chronic prostatitis, and that Dr. Schirmer had performed a TURP procedure on him, thus discrediting any testimony by Dr. Schirmer that the performance of such an operation on an individual with acute or chronic prostatitis constituted malpractice. *Id.*

19. *See Warner*, 348 Md. at 736, 705 A.2d at 1171 (citing the allegations in Mr. Warner's complaint). Judge Caplan found that Dr. Lerner was not liable. Brief of Appellee at 3, *Warner* (No. 69).

20. Brief of Appellee at 3, *Warner* (No. 69).

21. *Warner*, 348 Md. at 736, 705 A.2d at 1171. Section 4-302(a) provides:

- (a) *In general*.— A health care provider shall:
 - (1) Keep the medical record of a patient or recipient confidential; and
 - (2) Disclose the medical record only:
 - (i) As provided by this subtitle; or
 - (ii) As otherwise provided by law.

MD. CODE ANN., HEALTH-GEN. I § 4-302(a) (Supp. 1998).

22. Brief of Appellee at 3, *Warner* (No. 69).

23. *Warner*, 348 Md. at 736, 705 A.2d at 1171.

Records Act provided Dr. Lerner with the opportunity to gain access to Mr. Warner's medical records for use in the malpractice suit against him.²⁴ In so holding, however, the court expressed great reservations about the statute and the authorization it provided for an uninterested person to gain access to medical records without the knowledge of the patient to whom the record relates.²⁵ Specifically, the court expressed concern about the lack of notice to the patient, the lack of opportunity for the patient to contest the disclosure, and the lack of consideration by a court of competent jurisdiction to review the issue for the possible need of a protective order.²⁶

The Court of Special Appeals affirmed the lower court's ruling.²⁷ Upon examining section 4-305(b)(1)(iii), the court addressed the extremely broad nature of the word "any," and the numerous possibilities for interpretation of this word in the context of the statute.²⁸ Interpreting the statute according to its plain meaning, the court held that section 4-305(b)(1)(iii) permitted Dr. Lerner to gain access to Mr. Warner's records without his consent.²⁹ The court stated that it found this result adverse to some of the Act's purposes, including fortification of confidentiality and the creation of procedures under which records may be released without the patient's prior consent.³⁰ While the court stated it was obligated to interpret the law as it was clearly written, it urged the legislature to reexamine the language of subsection 4-305(b)(1)(iii) due to its potential for abuse.³¹

24. *Warner v. Lerner*, 115 Md. App. 428, 430-31, 693 A.2d 394, 395 (1997), *rev'd*, 348 Md. 733, 705 A.2d 1169 (1998) (quoting the oral opinion of the circuit court judge). The circuit court, paraphrasing the language of section 4-305(b)(iii), concluded that under the section, "*any provider may obtain any record of any patient if those records will assist in the defense of a lawsuit against that health care provider.*" *Id.* at 430, 693 A.2d at 395 (quoting the oral opinion of the circuit court judge).

25. *Id.* (quoting the oral opinion of the circuit court judge).

26. *Id.* (quoting the oral opinion of the circuit court judge).

27. *Id.* at 433, 693 A.2d at 396.

28. *Id.* at 438, 693 A.2d at 399. The court described the legislature's use of this word as "dangerously overbroad." *Id.*

29. *Id.* at 433, 693 A.2d at 396. The court noted that statutory language must be accepted as written and not as the court would like it to be. *Id.* (citing *Department of Econ. & Employment Dev. v. Taylor*, 108 Md. App. 250, 277, 671 A.2d 523, 537 (1996), *aff'd*, 344 Md. 687, 690 A.2d 508 (1997) (per curiam)).

30. *Id.* Further addressing the apparent inconsistencies between the purposes of the Records Act and the language of section 4-305(b)(1)(iii), the court stated: "While we surmise that the drafters may have intended that the terms of discretionary disclosure should be applicable to a legal action in which the patient has a direct interest . . . this intent stands in diametric opposition to the actual language used in the Act." *Id.*

31. *Id.* at 441, 693 A.2d at 400; *see also id.* at 437, 693 A.2d at 398 (arguing that "[g]ranting a health care provider unbridled discretion to disclose a confidential record is not only completely at odds with the legislative intent of the Act, but also repugnant").

The Court of Appeals granted certiorari to review whether Dr. Lerner could properly obtain Mr. Warner's medical records under the authorization of section 4-305(b)(1)(iii) of the Records Act.³²

2. *Legal Background.*—

a. Section 4-305(b).—In *Warner*, the court construed several provisions of the Maryland Confidentiality of Medical Records Act, which is codified at sections 4-301 through 4-309 of the Health-General Article of the Maryland Code.³³ The Records Act was first enacted in 1990,³⁴ and was the end product of Senate Bill 584,³⁵ proposed by the Senate Health Subcommittee in response to a perceived need for revision of the rules for disclosure of mental health records and for revision of the confidentiality of medical records in general.³⁶

Under the provisions of the bill, a health care provider was required to keep medical records confidential, with disclosure of infor-

32. *Warner*, 348 Md. at 734, 705 A.2d at 1170.

33. *Id.*

34. Confidentiality of Medical Records Act, ch. 480, 1990 Md. Laws 2023 (codified as amended at MD. CODE ANN., HEALTH-GEN. I §§ 4-301 to -309 (1994 & Supp. 1998)).

35. S.R. 584, 396th Leg., Reg. Sess. (Md. 1990).

36. *Public Health-Medical Records-Confidentiality: Hearings on S. 584 Before the Senate Econ. and Env'tl. Affairs Comm.*, 396th Legis., Reg. Sess. 1 (Md. 1990) [hereinafter *Hearings*] (testimony of Senator Paula C. Hollinger, Chairman, Health Subcomm.). The Floor Report on Senate Bill 584 noted the need for revision of the law governing the confidentiality of medical records due to the "serious emotional, physical, and financial harm to an individual that may result from the improper disclosure of all types of health care information." SENATE ECON. & ENVTL. AFFAIRS COMM., CONFIDENTIALITY OF MEDICAL RECORDS, S. 396-584, Reg. Sess. 3 (Md. 1990). The Preamble to Chapter 480 of the Acts of 1990, which gives more insight into the Legislature's intent, provides:

WHEREAS, Medical records contain personal and sensitive information that if improperly used or disclosed may result in significant harm to the emotional, financial, health care, and privacy interests of a patient or recipient; and

WHEREAS, Patients and recipients need access to their medical records to enable them to make informed decisions concerning their health care and to correct inaccurate or incomplete information about themselves; and

WHEREAS, In order to retain the full trust and confidence of patients and recipients, health care providers have an interest in assuring that the information in medical records will not be improperly disclosed, and that clear and certain rules exist for the disclosure and redisclosure of this information; and

WHEREAS, In order to protect the privacy of a patient or recipient, that disclosure of information from a medical record without the authorization of a person in interest be limited to the information that is relevant to the purpose for which disclosure is sought and, when feasible and appropriate, to a review of the record by a person who acknowledges the duty not to redisclose the identity of the patient or recipient.

1990 Md. Laws at 2024.

mation permitted only under certain delineated circumstances.³⁷ The bill set out specific circumstances under which a medical record may or must be disclosed, and to whom such disclosure is permitted or required.³⁸ There were three categories of disclosure: (1) mandatory disclosure with the authorization of a person in interest,³⁹ (2) discretionary disclosure without the authorization of a person in interest,⁴⁰ and (3) mandatory disclosure without the authorization of a person in interest.⁴¹ This disclosure scheme was incorporated into Maryland law through Chapter 480 of the Acts of 1990⁴² and was codified at Health-General Article sections 4-303, 4-305, and 4-306, respectively.⁴³

During the 1990 legislative session, the Senate Economic and Environmental Affairs Committee heard testimony from the Chairman of the Drafting Committee for the Uniform Health-Care Information Act, K. King Burnett,⁴⁴ in which he discussed access to medical records through court or administrative processes.⁴⁵ Specifically, Mr. Burnett expressed concern that Maryland law did not address the situation in which an individual's medical records are sought when the individual is not a party to the litigation and is not given notification

37. *Hearings, supra* note 36, at 1-2 (testimony of Senator Paula C. Hollinger, Chairman, Health Subcomm.).

38. *Id.* at 2-3.

39. *Id.* at 2. Mandatory disclosure was required to be made to a "person in interest," defined as:

[A]n adult on whom a health care provider maintains a medical record, that adult's duly appointed personal representative if he is deceased, a person authorized to consent to health care for that adult, a minor under certain conditions, a parent, guardian, custodian or representative of the minor designated by a court.

Id. (noting that "[a] provider *must* disclose health information to these people").

40. *Id.* Discretionary disclosures that could be made without the authorization of the person in interest included disclosure made to:

[A] provider's authorized employees, agents or consultants. A provider's legal counsel, a person who uses the information for educational or research purposes, a government agency, another health care provider who may be treating the patient in question, a third party payor or worker's comp claimant or for the delivery of emergency health care needs of the patient.

Id.

41. *Id.* Mandatory disclosures that were required to be made even without the authorization of the person in interest included disclosures made to "individuals investigating suspected neglect or abuse of a child or adult, to grand juries and prosecution and law enforcement agencies, to health professional licensing and disciplinary boards, to a provider or the provider's insurer or legal counsel, and to a medical or dental review committee." *Id.*

42. Confidentiality of Medical Records Act, ch. 480, 1990 Md. Laws 2023 (codified as amended at MD. CODE ANN., HEALTH-GEN. I §§ 4-303, -305, -306 (1994 & Supp. 1998)).

43. See HEALTH-GEN. I §§ 4-303, -305, -306.

44. See *Hearings, supra* note 36, at 3-6 (testimony of K. King Burnett, practicing attorney).

45. *Id.*

of the use of his medical records.⁴⁶ Noting that the Uniform Health Care Information Act incorporates a procedure of notification to non-parties whose medical records are sought,⁴⁷ Mr. Burnett urged the legislature to adopt a similar compulsory process scheme that would be applicable to all medical records in Maryland.⁴⁸ Mr. Burnett proposed an amendment that was modeled after the Uniform Act section

46. *Id.* at 5-6. Mr. Burnett noted: "In these instances, most medical professionals are simply producing the records rather than seeking to fight the summons or subpoena or even to notify the patient. . . . There is no hard law on this in Maryland, it is important that it be resolved, and that some privacy safeguards be established." *Id.* at 5.

47. Section 2-105(a)(1), (a)(2), and (b) of the Uniform Health-Care Information Act provides:

(a) Health-care information may not be disclosed by a health-care provider pursuant to compulsory legal process or discovery in any judicial, legislative, or administrative proceeding unless:

(1) the patient has consented in writing to the release of the health-care information in response to compulsory process or a discovery request; [or]

...

(9) a court has determined that particular health-care information is subject to compulsory legal process or discovery because the party seeking the information has demonstrated that the interest in access outweighs the patient's privacy interest.

(b) Unless the court, for good cause shown, determines that the notification should be waived or modified, if health-care information is sought . . . in a civil proceeding or investigation under paragraph (9) of subsection (a), the person seeking discovery or compulsory process shall mail a notice by first-class mail to the patient or patient's attorney of record of the compulsory process or discovery request at least [ten] days before presenting the certificate required under subsection (c) to the health-care provider.

UNIF. HEALTH-CARE INFO. ACT § 2-105(a)(1), (a)(9), (b), 9 U.L.A. 494 (1988).

48. *Hearings*, *supra* note 36, at 6 (testimony of K. King Burnett, practicing attorney) (noting that Senate Bill 584 incorporated a notification procedure only for records relating to mental health services).

on compulsory process;⁴⁹ however, it was not incorporated in the final bill as enacted.⁵⁰

Mr. Burnett's concerns with the proposed Senate Bill 584 focused on section 4-305(b)(1)(iii), as it did not contain a compulsory process section.⁵¹ Section 4-305(b)(1)(iii) of Senate Bill 584 stated:

A health care provider may disclose a medical record without the authorization of a person in interest . . . [t]o any provider's insurer or legal counsel, or the authorized employees or agents of a provider's insurer or legal counsel, for the sole purpose of handling a potential or actual claim against any provider.⁵²

This section thus authorizes a health care provider, in preparation for a trial, to make use of the medical records of a patient who is com-

49. K. King Burnett, Principal Proposed Amendment, S. 396-584, Reg. Sess. 6 (1990). The proposed amendment, which was modeled after section 2-105 of the Uniform Health-Care Information Act, provided as follows:

Section 4-308. Compulsory Process

(a) Health-care information may not be disclosed by a health-care provider pursuant to compulsory legal process or discovery in any judicial, legislative, or administrative proceeding unless:

(1) the patient has consented in writing to the release of the health-care information in response to compulsory process or a discovery request;

(2) the patient has waived the right to claim confidentiality for the health-care information sought;

(3) the patient is a party to the proceeding and has placed his [or her] physical or mental condition in issue; [or]

. . . .

(9) a court has determined that particular health-care information is subject to compulsory legal process or discovery because the party seeking the information has demonstrated that the interest in access outweighs the patient's privacy interest.

(b) Unless the court, for good cause shown, determines that the notification should be waived or modified, if health-care information is sought under paragraph (2), (4), or (5) of subsection (a) or in a civil proceeding or investigation under paragraph (9) of subsection (a), the person seeking discovery or compulsory process shall mail a notice by first-class mail to the patient or the patient's attorney of record of the compulsory process or discovery request at least [ten] days before presenting the certificate required under subsection (c) to the health-care provider.

Id. at 7 (first and third alteration in original); *see also infra* notes 108-111 and accompanying text (noting that had the legislature enacted the proposed compulsory process amendment, a Warner-like situation would never have arisen and the major concerns addressed by the concurrence about a broad reading of subsection 4-305(b)(1)(iii) would have been resolved).

50. *See Confidentiality of Medical Records Act*, ch. 480, 1990 Md. Laws 2023 (codified as amended at MD. CODE ANN., HEALTH-GEN. I §§ 4-301 to -309 (1994 & Supp. 1998)).

51. *See Hearings*, *supra* note 36, at 3-6 (testimony of K. King Burnett, practicing attorney).

52. S. 584, 396th Leg., Reg. Sess. 12-13 (Md. 1990).

pletely uninvolved in the claim, without giving any notification of this use to the patient. Had Mr. Burnett's concerns been heeded, a compulsory process section would have been added to the Maryland Confidentiality of Medical Records Act that applied to *all* medical records, not simply to mental health records.⁵³ However, the statute was enacted with a compulsory process provision applicable only with regard to mental health records,⁵⁴ and section 4-305(b)(1)(iii), as stated above,⁵⁵ was enacted.

b. Principles of Statutory Interpretation.—In attempting to gain insight into the intent of the legislature for a given statute, the Court of Appeals has repeatedly stated that “[t]he cardinal rule of statutory interpretation is to ascertain and effectuate the intention of the legislature.”⁵⁶ The language of the statute itself is the primary source in determining the legislative intent.⁵⁷ The court has further explained that in looking at the statutory language, “[i]f the words of the statute, construed according to their common and everyday meaning, are clear and unambiguous and express a plain meaning, we will give effect to the statute as it is written.”⁵⁸ The Maryland judiciary has also adopted the general rule that lacking any ambiguity, courts should refrain from attempting “under the guise of construction, to supply omissions or remedy possible defects in the statute, or to insert exceptions not made by the Legislature.”⁵⁹

Commentators have criticized the canons of statutory construction adopted and employed by the Court of Appeals.⁶⁰ In *Kaczorowski*

53. See *Hearings*, *supra* note 36, at 7 (testimony of K. King Burnett, practicing attorney).

54. HEALTH-GEN. I § 4-306.

55. *Id.* § 4-305.

56. *Gary v. State*, 341 Md. 513, 520, 671 A.2d 495, 498 (1996) (citing *Oaks v. Connors*, 339 Md. 24, 35, 660 A.2d 423, 429 (1995)).

57. See *id.* at 520-21, 671 A.2d at 498-99 (citing *Oaks*, 339 Md. at 35, 660 A.2d at 429).

58. *Oaks*, 339 Md. at 35, 660 A.2d at 428 (alteration in original) (internal quotation marks omitted) (quoting *Jones v. State*, 336 Md. 255, 261, 647 A.2d 1204 (1994)).

59. *Amalgamated Cas. Ins. Co. v. Helms*, 239 Md. 529, 536, 212 A.2d 311, 316 (1965); see also *McCance v. Lindau*, 63 Md. App. 504, 512, 492 A.2d 1352, 1356 (1985) (“We think that judges in the guise of interpreting statutes should not convert the law from what it really is to what the judges think it ought to be.” (citing *R. v. Ramsey*, 1 C. & E. 126, 136 (1883))).

60. See, e.g., Melvin J. Sykes, *A Modest Proposal for a Change in Maryland's Statutes Quo*, 43 MD. L. REV. 647, 649 (1984). Sykes argues:

The Court of Appeals of Maryland phrases the various canons of statutory construction differently, but all of the canons have two things in common: They say that the job of the court is to discover the actual intention of the legislature; and they emphasize the importance of statutory language. These canons, particularly when strung together in a case, have a magisterial tone and an aura of the inexorable absolute. My aim is to show that these canons of construction are

v. Mayor of Baltimore,⁶¹ the court acknowledged these concerns; however, it decided to continue adherence to the canons, noting that if they are used properly, "they afford an opportunity for principled decision making, as opposed to ad hoc judicial legislation."⁶² The court stated it would continue to recognize legislative preeminence, while also attempting to give straightforward rationales for its decisions.⁶³ The court also noted that "the plain-meaning rule does not force us to read legislative provisions in rote fashion and in isolation."⁶⁴ Explaining that by engaging in statutory interpretation the court is attempting to reach the legislative purpose or goal behind the statute, the court stated that it may consider "external manifestations" other than simply the words of the statute alone.⁶⁵ The external manifestations of legislative purpose that may be considered by the court include items such as a legislative committee report, a bill title, amendments to the bill, and other legislative history.⁶⁶ Of course, after ascertaining the intent of the legislature, it is possible that the intent may be in direct opposition to the plain meaning of the statute. When faced with such a dilemma, the Maryland courts have at times upheld the legislative intent, and in so doing, ignored the plain language of the statute.⁶⁷

3. *The Court's Reasoning.*—In *Warner*, the Court of Appeals held that section 4-305(b)(1)(iii) permits only the health care provider *in*

mere boilerplate and should be abandoned because they often are misleading and inconsistent. . . . I merely suggest that inserting rules of interpretation helter-skelter in opinions is misleading and that the two favorite canons—one requiring a court to search for the actual intent of a legislature and the other requiring a court to divine the plain meaning of a statute—are too general to be useful in deciding whether a particular statute dictates a particular result.

Id. at 649-50 (citation omitted).

61. 309 Md. 505, 525 A.2d 628 (1987).

62. *Id.* at 512, 525 A.2d at 631.

63. *Id.*

64. *Id.* at 514, 525 A.2d at 632.

65. *Id.* at 515, 525 A.2d at 632.

66. *Id.*, 525 A.2d at 633 (citing *State v. One 1983 Chevrolet Van*, 309 Md. 327, 344-45, 524 A.2d 51, 59 (1987)).

67. See Sykes, *supra* note 60, at 656-57 (discussing three different interpretations of the plain meaning rule used by the Court of Appeals, and stating that "[a]ccording to the third statement of the rule, a court may disregard the plain meaning of a statute, if the 'real intent' of the legislature is inconsistent with the plain meaning"); e.g., *State v. Fabritz*, 276 Md. 416, 422, 348 A.2d 275, 279 (1975) ("In construing statutes, . . . results that are unreasonable, illogical or inconsistent with common sense should be avoided whenever possible consistent with the statutory language, with the real legislative intention prevailing over the intention indicated by the literal meaning." (citing *B.F. Saul Co. v. West End Park*, 250 Md. 707, 256 A.2d 591 (1968); *Sanza v. Maryland Bd. of Censors*, 245 Md. 319, 226 A.2d 317 (1967); *Heicheht v. State*, 225 Md. 251, 170 A.2d 212 (1961))).

possession of medical records to have the discretionary authority to disclose the records without the authorization of the patient.⁶⁸ In considering this case, the court examined several sections of the Maryland Confidentiality of Medical Records Act.⁶⁹ The court addressed section 4-302(a), which lays out the duty of a health care provider to maintain the confidentiality of patients' medical records, allowing for disclosure only as provided by law.⁷⁰ The court also looked at section 4-303, which requires "a health care provider to disclose a medical record on the authorization of a person in interest."⁷¹ Neither party asserted that Dr. Lerner or Union Memorial Hospital had the authorization of a person in interest to disclose the medical records to either Dr. Lerner or his attorney, and thus section 4-303 was inapplicable to the instant case.⁷² The court then considered section 4-306, which provides for the mandatory disclosure of medical records without the authorization of a person in interest.⁷³ Section 4-306 is applicable in six enumerated circumstances,⁷⁴ none of which were found to be present.⁷⁵

68. *Warner*, 348 Md. at 739-40, 705 A.2d at 1172-73.

69. *See id.* at 738-41, 705 A.2d at 1172-73.

70. *Id.* at 738, 705 A.2d at 1172. While section 4-302(b) does exempt certain types of information from the Records Act, neither party suggested that any of the exemptions applied to the instant case. *Id.*

71. *Id.*

72. *Id.*

73. *Id.* at 738-39, 705 A.2d at 1172.

74. *See* MD. CODE ANN., HEALTH-GEN. I § 4-306(a) (1994) (providing mandatory disclosure of a medical record without authorization of a person in interest for various types of investigations, including investigations of suspected abuse or neglect and investigations of the provision of health services; disclosure also mandated to a health care provider or the provider's insurer or legal counsel when a civil action is initiated by the person in interest).

75. *Warner*, 348 Md. at 738-39, 705 A.2d at 1172. The court noted the relevance of section 4-306(a)(3), which requires the disclosure "[t]o a health care provider or the provider's insurer or legal counsel, [of] all information in a medical record relating to a patient or recipient's health, health care, or treatment which forms the basis for the issues of a claim in a civil action initiated by the patient, recipient, or person in interest." *Id.* at 738, 705 A.2d at 1172 (internal quotation marks omitted) (quoting HEALTH-GEN. I § 4-306(a)(3)). The court noted that if Mr. Warner had been the claimant and the report was pertinent to the claim, the hospital may have had to disclose the record to Dr. Lerner under this provision. *Id.*

The court also examined section 4-306(a)(6), which requires the disclosure of a medical record "[i]n accordance with compulsory process, a stipulation by a patient or person in interest, or a discovery request permitted by law to be made to a court, an administrative tribunal, or a party to a civil court, administrative, or health claims arbitration proceeding." *Id.* at 739, 705 A.2d at 1172 (alteration in original) (internal quotation marks omitted) (quoting HEALTH-GEN. I § 4-306(a)(6)). This section had no relevance to the instant case because Mr. Warner's medical record was not acquired pursuant to any of the above processes. *Id.*

The court based its decision in *Warner* on section 4-305, which relates to permissive disclosures.⁷⁶ The court focused on subsection (b)(1)(iii), which the lower courts relied on to find that Dr. Lerner had authority to disclose Mr. Warner's pathology report.⁷⁷ Section 4-305(b)(1)(iii) permits disclosure of medical records by a health care provider without the authorization of the person in interest "[t]o any provider's insurer or legal counsel, or the authorized employees or agents of a provider's insurer or legal counsel, for the sole purpose of handling a potential or actual claim against any provider."⁷⁸ The court noted that the lower courts focused on the adjective "any" as permitting disclosure to Dr. Lerner's legal counsel, "as the legal counsel for 'any provider.'"⁷⁹ The court, however, characterized that approach as flawed, stating that section 4-305 was not applicable under the facts of the case.⁸⁰ According to the Court of Appeals, section 4-305 only gives discretion to a health care provider *in possession* of medical records to disclose the records without the consent of the person in interest.⁸¹ As Union Memorial Hospital was the health care provider in possession of Mr. Warner's pathology report, section 4-305(b)(1)(iii) would only give authorization to Union Memorial Hospital to disclose the report to Dr. Lerner's attorney.⁸² Thus, by gaining access to the records himself, Dr. Lerner prevented Union Memorial Hospital from exercising its discretion under section 4-305(b)(1)(iii).⁸³ In summary, the court stated it could find nothing

76. *Id.* Unlike section 4-306, in which disclosures are mandatory even without the authorization of a person in interest, the language of section 4-305(b) provides for nine circumstances in which "[a] health care provider *may* disclose a medical record without the authorization of a person in interest." HEALTH-GEN. I § 4-305(b) (emphasis added). In fact, section 4-305(a) expressly states that "[t]his section may not be construed to impose an obligation on a health care provider to disclose a medical record." *Id.* § 4-305(a).

77. *Warner*, 348 Md. at 739, 705 A.2d at 1172-73.

78. HEALTH-GEN. I § 4-305(b)(1)(iii).

79. *Warner*, 348 Md. at 739, 705 A.2d at 1172-73.

80. *Id.*, 705 A.2d at 1173.

81. *Id.*

82. *Id.* at 739-40, 705 A.2d at 1173.

83. *Id.* at 740, 705 A.2d at 1173. The court chose not to decide whether section 4-305(b)(1)(iii) would give authority to Union Memorial Hospital to disclose to a provider's attorney or insurer the medical records of an individual who was not a patient of the provider. *Id.* at n.3. However, the court did find it noteworthy that while section 4-305(b)(1)(iii) authorizes disclosure to "any provider's insurer or legal counsel," it does not authorize disclosure to the provider. *Id.* (quoting HEALTH-GEN. I § 4-305(b)(1)(iii)). The court noted the anomaly created by the disclosure scheme of section 4-305(b)(1)(iii), if the Legislature did in fact intend to permit disclosure by a provider in possession of medical records to a second provider's attorney or insurer, and yet not to the second provider him or herself. *Id.* The court further stated that the failure of section 4-305(b)(1)(iii) to authorize disclosure to the provider "may well be an indication that the provision was intended to be restricted to the situation in which the possessor of the medical records . . . is

in any provision of section 4-305 that authorized Dr. Lerner to access Mr. Warner's medical records without the consent of the hospital.⁸⁴

In a concurring opinion, Judge Raker agreed with the majority to the extent the court held that section 4-305(b)(1)(iii) did not give authorization to Dr. Lerner to obtain the medical records of Mr. Warner on his own.⁸⁵ Judge Raker wrote separately, however, to state her rejection of the "expansive reading" of 4-305(b)(1)(iii) adopted by the lower courts, under which Lerner, through his counsel, could obtain Warner's medical records without his prior consent or authorization.⁸⁶ Judge Raker dismissed the idea that Union Memorial had any authorization to disclose Mr. Warner's medical records if it chose to do so.⁸⁷ To further clarify her position, Judge Raker stated that she did not believe that section 4-305 gave discretion to a hospital, or any other health care provider, to assist a doctor faced with a malpractice action "by releasing to the doctor's insurer or legal counsel records of a person other than the plaintiff."⁸⁸ Focusing on the facts of the instant case, Judge Raker asserted that she would hold that section 4-305(b)(1)(iii) did not authorize Union Memorial Hospital to disclose Mr. Warner's medical records, absent Mr. Warner's consent.⁸⁹

the provider being sued, for only in that setting would the 'provider' have no need to have the records disclosed to it." *Id.* In a concurring opinion, Judge Raker made clear that in such a situation, she would hold that Union Memorial Hospital would have no authority under 4-305(b)(1)(iii) to disclose Mr. Warner's records to assist Dr. Lerner in his malpractice suit, absent Mr. Warner's consent. *Id.* at 741-42, 705 A.2d at 1174 (Raker, J., concurring); see *infra* notes 85-92 and accompanying text (discussing Judge Raker's concurring opinion).

84. *Warner*, 348 Md. at 740, 705 A.2d at 1173. Having addressed and rejected the notion that Dr. Lerner had authorization under the Records Act to obtain and disclose Mr. Warner's medical records, the court addressed the issue of whether Mr. Warner properly stated a cause of action upon which relief could be granted. *Id.* at 740-41, 705 A.2d at 1173. The court turned to section 4-309, which sets forth violations of the subtitle and the resultant penalties. *Id.* The court specifically focused upon section 4-309(b), which imposes liability on any person who obtains a medical record under false pretenses or through deception, and section 4-309(d), which authorizes liability for actual damages from any person who knowingly violates a provision of the subtitle. *Id.* The court found the factual allegations in the complaint and Warner's claim that Lerner obtained the pathology report "wrongfully, willfully and in violation of the above statute" sufficient to state a claim that the record was obtained knowingly by either false pretenses or through deception. *Id.* at 741, 705 A.2d at 1173. The court held that the complaint stated a cause of action for damages under section 4-309, thus finding the Court of Special Appeals in error for affirming the judgment of the circuit court to dismiss the claim. *Id.*, 705 A.2d at 1173-74.

85. *Id.* at 741, 705 A.2d at 1174 (Raker, J., concurring).

86. *Id.* at 741-42 & n.1, 705 A.2d at 1174 & n.1.

87. *Id.* at 741-42, 705 A.2d at 1174.

88. *Id.* at 742, 705 A.2d at 1174.

89. *Id.*

To support her position, Judge Raker relied upon the Preamble to the Maryland Confidentiality of Medical Records Act and its indication of the General Assembly's intent "to protect the privacy of patients and to maintain the confidentiality of medical records, while establishing clear and certain rules for disclosure of those records."⁹⁰ She asserted that the broad interpretation given section 4-305 by the lower courts counteracted the purposes behind the Records Act and rendered the confidentiality of medical records illusory.⁹¹ Judge Raker further noted her disdain for the broad reading of the section as it would allow the publication of medical records, without consent or knowledge of the patient, in a lawsuit in which the patient has no connection, and "with no timely opportunity to object, complain, or to secure a protective order."⁹²

4. *Analysis.*—In *Warner v. Lerner*, the Court of Appeals held that only the health care provider *in possession* of medical records is given the discretion to disclose those records without the authorization of the patient.⁹³ The court limited its holding to the specific facts of the instant case.⁹⁴ It chose not to address the issue of whether a provider in possession of a patient's medical records had discretion under section 4-305(b)(1)(iii) to "disclose to a provider's insurer or attorney the medical record of someone who was not a patient of the provider."⁹⁵ The court correctly avoided settling on a reading of section 4-305(b)(1)(iii) that would be in conflict with the plain meaning of the statute or its history, and properly left it to the legislature to make any changes it deemed necessary.

In interpreting section 4-305(b)(1)(iii), the Court of Appeals managed to stay within the framework of the plain-meaning rule as described in *Kaczorowski*, while simultaneously coming to a result that promotes the goals and purposes set forth by the legislature in enacting the Records Act. Under the plain-meaning rule described in *Kaczorowski*, the words of the statute are relied upon in an effort to discover the purpose, aim, or policy of the statute.⁹⁶ The court in *Kaczorowski* noted, however, that the plain-meaning rule is not inflexi-

90. *Id.* (quoting Confidentiality of Medical Records Act preamble, ch. 480, 1990 Md. Laws 2023, 2024).

91. *Id.* at 743, 705 A.2d at 1174.

92. *Id.*

93. *Warner*, 348 Md. at 739-40, 705 A.2d at 1172-73.

94. *See id.* at 740, 705 A.2d at 1173.

95. *Id.* at n.3.

96. *Kaczorowski v. Mayor of Baltimore*, 309 Md. 505, 513, 525 A.2d 628, 632 (1987).

ble and does not require a statute be read in "rote fashion."⁹⁷ In attempting to discover legislative intent, a court may thus "consider the consequences resulting from one meaning rather than another, and adopt that construction which avoids an illogical or unreasonable result, or one which is inconsistent with common sense."⁹⁸

Section 4-305(b)(1)(iii) provides that "[a] health care provider may disclose a medical record without the authorization of a person in interest . . . [t]o any provider's insurer or legal counsel."⁹⁹ Rejecting the Court of Special Appeals's focus upon the word "any," the court instead concentrated on the phrase "health care provider" in section 4-305(b).¹⁰⁰

In *Warner*, the Court of Appeals held that Dr. Lerner did not have possession of Mr. Warner's medical records,¹⁰¹ rather, Union Memorial Hospital was the provider in possession of the medical records.¹⁰² To reach the result desired by Dr. Lerner, section 4-305(b)(1)(iii) would have to be read as authorizing a provider without possession of medical records the discretion to obtain and disclose those medical records, without first obtaining permission from either the patient or the possessor of the patient's medical records. Such authorization would create an illogical result, especially when considered in light of the Records Act's intent to "protect the privacy of patients and to maintain the confidentiality of medical records."¹⁰³ In a decision between a health care provider in possession of medical records or a provider without possession, the court chose the more logical meaning of the phrase "health care provider." Thus, in determining the plain meaning of section 4-305(b)(1)(iii) as only allowing disclosure by the provider in possession of the medical records, the court followed *Kaczorowski*, adopting the construction which best avoids an "il-

97. *Id.* at 514, 525 A.2d at 632.

98. *Id.* at 513-14, 525 A.2d at 632 (citing *Tucker v. Fireman's Fund Ins. Co.*, 308 Md. 69, 75, 517 A.2d 730, 732 (1986)).

99. MD. CODE ANN., HEALTH-GEN. I § 4-305(b)(1)(iii) (Supp. 1998).

100. *See Warner*, 348 Md. at 739, 705 A.2d at 1173.

101. *Id.*

102. *Id.* Although the court stated that while Dr. Lerner might have been able to show that some policy of Union Memorial Hospital granted him permission to gain access to Mr. Warner's medical records in order to defend against the malpractice initiated by Mr. Kelly, Mr. Warner's allegations implicitly rejected such permission. *Id.* at 741, 705 A.2d at 1173. Since the issue was brought on appeal from the granting of a motion to dismiss the action, the court was bound to "assume as fact the well-pleaded material allegations in the complaint and any reasonable inferences that may be drawn from them." *Id.* at 735, 705 A.2d at 1170 (citing *Flaherty v. Weinberg*, 303 Md. 116, 135-36, 492 A.2d 618, 628 (1985)).

103. *Id.* at 742, 705 A.2d at 1174 (Raker, J., concurring).

logical or unreasonable result, or one which is inconsistent with common sense.”¹⁰⁴

Examining the plain language of the statute is only the starting point in divining legislative intent. The court must also look to the external manifestations of the Legislature’s intent.¹⁰⁵ Judge Raker’s concurring opinion in *Warner* appears correct in its view that the interpretation given section 4-305(b)(1)(iii) by the lower courts is contrary to the purposes of the Records Act, which is to protect the privacy of patients and maintain the confidentiality of medical records.¹⁰⁶ However, an examination of the relevant legislative history weakens the assertion that the Legislature did not intend the result reached by the lower courts. As the Court of Appeals noted in *Kaczorowski*, the legislative history of a statute may be taken into account when searching for legislative purpose, even in unambiguous statutes.¹⁰⁷ The relevant legislative history of section 4-305(b)(1)(iii) shows that the Legislature was forewarned that section 4-305(b)(1)(iii) left open the possibility

104. *Kaczorowski v. Mayor of Baltimore*, 309 Md. 505, 513-14, 525 A.2d 628, 632 (1987) (internal quotation marks omitted) (quoting *Tucker v. Fireman’s Fund Ins. Co.*, 308 Md. 69, 75, 517 A.2d 730, 732 (1986)). In its analysis, the court chose not to focus on the word “any,” as had been the focus of the statutory interpretation undertaken by the Court of Special Appeals. *Warner*, 348 Md. at 739, 705 A.2d at 1173. In opposition to the holding of the Court of Special Appeals, the Court of Appeals strongly implied that if it had so chosen to focus its inquiry, it probably would have reached the conclusion that section 4-305(b)(1)(iii) *did not* authorize Dr. Lerner’s attorney to obtain and disclose Mr. Warner’s medical records. *Id.* at 740 n.3, 705 A.2d at 1173 n.3. The court indicated that even had Union Memorial Hospital (the provider in possession) disclosed the records to Dr. Lerner’s attorney, the court probably would not have read section 4-305(b)(1)(iii) as permitting such a result. The plain language of section 4-305(b)(1)(iii) does not provide for disclosure to any provider’s legal counsel *and* to any provider, as would be necessary to achieve the result Dr. Lerner sought, since he was not originally in possession of Mr. Warner’s medical records. The court described a reading of section 4-305(b)(1)(iii) that allowed disclosure to the provider’s attorney or insurer but not to the provider as an anomaly. *Id.* Discussing this anomaly, the court indicated what its reading of the word “any” might be when it stated:

[t]hat may well be an indication that the provision was intended to be restricted to the situation in which the possessor of the medical records, or perhaps an employee or agent of that possessor, is the provider being sued, for only in that setting would the “provider” have no need to have the records disclosed to it.

Id.

105. *Kaczorowski*, 309 Md. at 514-15, 525 A.2d at 632-33; *see supra* notes 65-66 and accompanying text (noting the various “external manifestations” of the legislature’s intent a court may consider when interpreting a statute).

106. *See Warner*, 348 Md. at 743, 705 A.2d at 1174-75 (Raker, J., concurring) (“Disclosure of non-patient records could hardly have been the intent of the General Assembly when, in the interest of expanding the confidentiality of medical records, the General Assembly enacted the Maryland Confidentiality of Records Act.”); *see also supra* note 36 (quoting the preamble to the Maryland Confidentiality of Medical Records Act).

107. *Kaczorowski*, 309 Md. at 515, 525 A.2d at 633 (citing *Ogrinz v. James*, 309 Md. 381, 390, 524 A.2d 77, 82 (1987)).

that the medical records of individuals who are neither parties to the litigation, nor notified of the use of their medical records, could be obtained.¹⁰⁸ An amendment was proposed to combat this potential problem. This amendment would have required one of several conditions to be met before medical records could be disclosed under such circumstances, including one condition that required the patient to consent in writing to the release of his or her medical records in response to compulsory process or a discovery request.¹⁰⁹ Clearly, the Legislature was aware of the possibility of a situation like *Warner* arising due to the language of subsection 4-305(b)(1)(iii). In fact, had a compulsory process section been added to relate to all medical records as had been suggested to the Legislature,¹¹⁰ Judge Raker's concerns regarding a broad reading of section 4-305(b)(1)(iii) would have been resolved.¹¹¹ It chose not to do so. If the Legislature had originally intended to give notice to a patient and prevent a *Warner*-like situation, it would have taken steps to achieve this result, either by incorporating the amendment requiring compulsory process for all medical records or by some other method.

Rather than legislating through case law, the court properly left it to the legislature to amend the statute. Judge Raker's concurrence and the Court of Special Appeals's opinion, however, sent a strong message to the legislature of the need for reexamination of the issue.

108. See *Hearings*, *supra* note 36, at 3-6 (testimony of K. King Burnett, practicing attorney) (warning that under the proposed bill, the protective measures of notification to persons who are not parties to the litigation "is limited to records relating to mental health services"); *supra* notes 44-49 and accompanying text (summarizing the testimony of K. King Burnett).

109. See *supra* notes 49-50 and accompanying text (quoting the proposed amendment).

110. See K. King Burnett, Principal Proposed Amendment, S. 396-584, Reg. Sess. 5 (1990) (discussing section 4-307, which mandates compulsory process only in regard to the disclosure of mental health records, and advising that "[t]he provisions should relate to all medical records" and "[t]here is no rational basis for a distinction between mental health records and others (they are often mixed anyway)"). The legislature added compulsory process provisions in both section 4-306(a)(6) (for mandatory disclosures) and section 4-307(h)(v) (dealing with mandatory disclosures of mental health records). See MD. CODE ANN., HEALTH-GEN. I §§ 4-306(a)(6), -307(h)(v) (1994). The legislature seems to have considered the benefits of compulsory process for certain types of disclosures of medical records, and yet chose not to incorporate such a provision for giving notice for permissive disclosures of medical records pursuant to section 4-305(b).

111. See *Warner*, 348 Md. at 743, 705 A.2d at 1174 (Raker, J., concurring) (noting her concern that under the interpretation given section 4-305(b)(1)(iii) "[r]ecords could . . . be published, without a patient's knowledge or consent, in a lawsuit in which the patient has no interest or connection thereto, and with no timely opportunity to object, complain, or to secure a protective order").

The legislature, swiftly responding to *Warner*,¹¹² enacted Senate Bill 649 as Chapter 630 of the Acts of 1998.¹¹³ Section 4-305(b)(1)(iii) was amended only to provide for the disclosure of medical records of a *claimant* whose medical records relate to the claim.¹¹⁴ Thus, no longer can a situation like *Warner* arise, in which the records of a patient with no involvement in a lawsuit are obtained and used in that lawsuit, without giving any notice to the patient. The new section 4-305(b)(1)(iii) will not offend concepts of confidentiality and privacy because a claimant should be on notice that his or her records may be used in the suit he or she brought. The swift action by the legislature gives support to the court's decision in *Warner*. The court correctly avoided engaging in ad hoc legislation, thus properly leaving legislative duties to the legislature. Through the *Warner* opinion, however, the court sent a strong message to the legislature about the potential conflict between the Confidentiality of Medical Records Act's goals of confidentiality and privacy and the result that was possible under section 4-305(b)(1)(iii).

5. *Conclusion.*—The *Warner* court's interpretation of section 4-305(b)(1)(iii) correctly stayed within the plain meaning of the statute and simultaneously reached a result consistent with the Confidentiality of Medical Records Act's stated goals of privacy for the patient and confidentiality of medical records. The result under *Warner* left open the possibility that section 4-305(b)(1)(iii) authorized providers to obtain and disclose the medical records of a patient who is not related to the claim, with no need to notify that patient. The court refrained

112. See *Disclosure of Medical Records-Health Care Provider's Insurer or Legal Counsel: Hearings on S. 649 Before the Senate Econ. and Envtl. Affairs Comm.*, 412th Legis., Reg. Sess. 1 (Md. 1998) (testimony of Senator Paula C. Hollinger, Chairman, Health Subcomm.) (stating that Senate Bill 649 "arises from the case of *Warner v. Lerner* which demonstrates that a loophole exists in Maryland law regarding the confidentiality of medical records").

113. Act of May 21, 1998, ch. 630, 1998 Md. Laws 3065 (codified at MD. CODE ANN., HEALTH-GEN. I § 4-305 (Supp. 1998)). Chapter 630 states in pertinent part:

(b) A health care provider may disclose a medical record without the authorization of a person in interest:

....

(iii) to any provider's insurer or legal counsel, or the authorized employees or agents of a provider's insurer or legal counsel, for the sole purpose of handling a potential or actual claim against any provider if the medical record is maintained on the claimant and relates to the subject matter of the claim.

Id. at 3067-68.

114. *Id.* at 3068. Note that the statute is now narrower than it would have been had it incorporated the compulsory process section recommended by Mr. Burnett. As amended, section 4-305(b)(1)(iii) only authorizes the disclosure of the medical records of claimants, with no provision for obtaining and disclosing the medical records of nonclaimant patients. See *id.*

from legislating by case law, correctly leaving the decision to the legislature to change the language of section 4-305(b)(1)(iii).

The *Warner* court sent a message to the legislature of a possible need for revision of section 4-305(b)(1)(iii) to avoid compromising the goals under the Records Act. The legislature's answer to *Warner* was to amend the statute to make clear that it does not authorize the disclosure of the medical records of a patient not involved in the suit and unaware of the use of his or her records.

AMY BETH LEASURE

X. INSURANCE

A. Maryland Common Law Judicial Remedies Run Concurrent with Administrative Remedies for Alleged Acts of Fraud, Negligence, and Negligent Misrepresentation by an Insurer

In *Zappone v. Liberty Life Insurance Co.*,¹ the Court of Appeals held that common law judicial remedies for insurance fraud, negligence, and negligent misrepresentation are fully concurrent with the administrative remedies provided for under the Unfair Trade Practices subtitle of the Maryland Insurance Code.² Thus, an aggrieved insured may pursue “recognized independent tort remed[ies] without first invoking and exhausting the administrative remedy under the Unfair Trade Practices subtitle of the Insurance Code.”³ The court reasoned that “where neither the statutory language nor the legislative history disclose an intent that the administrative remedy is to be exclusive, and where there is an alternative judicial remedy under another statute or under common law or equitable principles, there is no presumption that the administrative remedy was intended to be exclusive.”⁴ Even though there is a presumption that the legislature intended an administrative remedy to be primary to common law remedies, the court further reasoned that this presumption is rebuttable, and other factors are pertinent.⁵ In so ruling, the Court of Appeals reached a logical summation of its prior case law and clarified its former presumptions concerning the primary jurisdiction doctrine. The result will produce greater judicial uniformity and consistency by providing clear guidance to Maryland courts as they determine when an administrative remedy is exclusive, primary, or concurrent in relation to judicial remedies.

1. 349 Md. 45, 706 A.2d 1060 (1998).

2. *Id.* at 68, 706 A.2d at 1071. At the time of these proceedings, the Maryland Insurance Code was codified at Article 48A of the 1957 Code. MD. ANN. CODE art. 48A, §§ 212-240J (1994) (recodified as amended at MD. CODE ANN., INS. §§ 27-101 to -911 (1997)). In 1997, the Maryland General Assembly recodified these provisions at Title 27 of the new Insurance Article, entitled “Unfair Trade Practices and Other Prohibited Practices.” 1997 Md. Laws ch. 35 (recodified as amended at MD. CODE ANN., INS. §§ 27-101 to -911 (1997)). This Note will use the code citations in effect when the case was decided by the circuit court.

3. *Zappone*, 349 Md. at 68, 706 A.2d at 7071.

4. *Id.* at 63, 706 A.2d at 1069.

5. *Id.* at 64, 706 A.2d at 1069.

1. *The Case.*—In March 1989, William Ray Miller, co-owner of First Financial Resources, Inc., an independent insurance agency,⁶ contacted Ricardo Zappone, the sole shareholder and an employee of Print-A-Copy, Inc.,⁷ regarding the purchase of a life insurance policy.⁸ Miller told Zappone that the policy, the Executive Wealth Builder II, would satisfy Zappone's needs of providing benefits in the event of premature death and would accrue a large cash value over a short period to provide for his retirement.⁹ Miller further represented, through computer-generated illustrations, that a one-time premium payment of \$500,000 could fully fund the policy.¹⁰ Miller also claimed that no other premiums would be necessary for the policy to stay in effect and perform as illustrated, and that the policy would provide the needed cash accumulation for Zappone's retirement.¹¹ In addition to the one-time premium payment, Miller told Zappone, a binder payment of \$10,000 would be required to start the policy.¹²

Zappone agreed to purchase the policy, and at Miller's suggestion, Zappone financed the purchase of the policy pursuant to a "split-dollar"¹³ agreement between himself and Print-A-Copy.¹⁴ According to the agreement, Print-A-Copy loaned Zappone \$510,000 to pay the policy's premium, and Zappone conveyed a security interest in the proceeds of the policy, up to the amount of the loan, to Print-A-Copy.¹⁵ To finance the loan, Print-A-Copy obtained a loan from Maryland National Bank for \$510,000, and Print-A-Copy granted its security interest in the policy to the bank as collateral for the loan.¹⁶ Zappone was convinced to fund the policy in this manner by Miller's represen-

6. *Id.* at 52, 706 A.2d at 1064. First Financial is the licensed managing general agency, while Miller is the licensed general agent for Liberty Life Insurance Company in the State of Maryland. *Id.*

7. *Id.* Print-A-Copy is a small business providing printing, copying, and office supply services in Montgomery County, Maryland. *Id.*

8. *Id.*

9. *Id.* at 53, 706 A.2d at 1064. The plan consisted of a life insurance policy with a face amount of one million dollars that could be used as a deferred compensation plan to accumulate a substantial cash value in a relatively short time. *Id.*

10. *Id.*

11. *Id.*

12. *Id.*

13. *Id.* A "split dollar" arrangement typically involves a situation where an employee is in need of permanent life insurance protection but lacks sufficient resources to make the required premium payments. STANFORD A. WYNN, *THE INSURANCE COUNSELOR* 23 (1991). The employer, however, has sufficient resources and is willing and able to assist the employee in obtaining the needed insurance protection. *Id.* The arrangement usually provides for a sharing or "splitting" of the policy benefits to repay the employer. *Id.*

14. *Zappone*, 349 Md. at 53, 706 A.2d at 1064.

15. *Id.*

16. *Id.*

tation that Print-A-Copy's interest payments on the loan would be tax deductible.¹⁷

Zappone's tax advisor later informed Zappone that the interest Print-A-Copy paid on the Maryland National loan was not deductible.¹⁸ When Zappone confronted Miller about the tax consequences of the interest payments, Miller maintained that the interest payments were deductible.¹⁹

In May 1990, Liberty Life notified Zappone that his \$510,000 premium payment exceeded, by \$407,034.48, the statutory maximum that could be paid into a life insurance policy.²⁰ The written notice advised Zappone that he would be taxed on any policy distributions in excess of the amount of premiums paid if the premiums exceeded the new statutory limits, and advanced several options that would rectify the problem.²¹ The letter also stated that if Zappone failed to make an election by May 30, 1990, Liberty Life would automatically place the excess premium payment in an "advance premium deposit account."²² Zappone contacted Miller upon receipt of the letter, and Miller allegedly told him not to worry about the letter because he would "take care of it."²³ Zappone did not respond to the letter because he believed that Miller was making the necessary arrangements.²⁴

In July 1990, Liberty Life deposited the excess premium amount in an "advance premium deposit" account²⁵ after receiving no re-

17. *Id.* Liberty Life issued the policy to Zappone in July 1989. *Id.* at 54, 706 A.2d at 1064. However, instead of a one-time premium payment as agreed, the policy called for monthly premiums. *Id.* First Financial corrected this problem with Liberty Life and the policy was converted to a single premium policy. *Id.*

18. *Id.* at 54, 706 A.2d at 1064.

19. *Id.*

20. *Id.*, 706 A.2d at 1065.

21. *Id.* The options set forth by Liberty Life were: (1) Zappone could deposit the excess premium payment in an "advance premium deposit account," which would automatically pay the maximum allowable statutory amounts into the policy, while the interest on the accounts would be taxed annually, and Zappone could withdraw interest or principle at any time"; (2) Zappone could deposit the excess premium payment into a "side fund account" which would operate like an advance premium deposit account but the interest would be tax deferred and Zappone would not have access to the interest as it accrued"; (3) Zappone could have the excess premium amount refunded, which would then require an annual premium payment; or (4) Zappone could keep the full amount already in the policy, and be taxed on the excess policy distributions as originally described in the letter. *Id.* at 54-55, 706 A.2d at 1065.

22. *Id.* at 55, 706 A.2d at 1065.

23. *Id.* (internal quotation marks omitted).

24. *Id.*

25. See *supra* note 21 and accompanying text (discussing the purpose as well as describing an advance premium deposit account).

sponse from Zappone.²⁶ Upon receiving a letter from Liberty Life informing him of the election, Zappone again contacted Miller, who suggested the execution of a special "side fund agreement."²⁷ The creation of this agreement, Miller explained to Zappone, would "solve any tax problems associated with the large premium amount and without creating new tax liabilities or reducing the policy's cash value."²⁸ Because of these representations, Zappone signed the "special side fund agreement," thereby switching the policy from one funded by an "advanced premium deposit" to one funded by a "special side fund agreement."²⁹

In mid-1992, Zappone's estate-planning specialist informed him that the establishment of the special side-fund agreement and the issuance of a monthly insurance premium would prevent the insurance policy from performing as represented by Miller and Liberty Life unless substantial additional premiums were paid.³⁰ Zappone learned that at the end of the twelve years when he intended to begin withdrawing from the policy, the policy would be worth \$400,000 less than the face value of the policy, substantially less than the amount Miller represented, and would be insufficient to fund his retirement.³¹

Subsequently, Zappone and Print-A-Copy filed a multi-count complaint in the Circuit Court for Montgomery County, alleging fraud, negligence, and negligent misrepresentation against Miller, First Financial, and Liberty Life.³² After extensive discovery, various motions for summary judgment and dismissal were filed by all three defendants.³³ The circuit court ruled that the allegations of fraud, negligence, and negligent misrepresentation fell under the unfair trades practices provisions of the Insurance Code, which constituted the exclusive remedy for "all claims of unfair or deceptive trade practices by insurers or insurance agents in connection with the sale of

26. *Zappone*, 349 Md. at 55, 706 A.2d at 1065.

27. *Id.* As the court explained:

A side fund agreement is a special interest bearing account from which annual premium payments are made for a life insurance policy to insure compliance with the requirements of the Technical and Miscellaneous Revenue Act (TAMRA), 26 U.S.C. § 7702A (1994). This agreement acts as an escrow account in that the funds deposited therein accrue interest and must be used to pay the annual premiums on the insurance policy which comply with the TAMRA rules for the policy.

Id. at 55 n.3, 706 A.2d at 1065 n.3.

28. *Id.* at 55, 706 A.2d at 1065.

29. *Id.*

30. *Id.* at 55-56, 706 A.2d at 1065.

31. *Id.* at 56, 706 A.2d at 1065.

32. *Id.*

33. *Id.*

insurance.”³⁴ Relying on the holding of *Vicente v. Prudential Insurance Co. of America*,³⁵ the circuit court reasoned that because plaintiffs asserted claims expressly covered by the Insurance Code, their sole remedy would be an administrative hearing before the Insurance Commissioner.³⁶ Zappone and Print-A-Copy timely appealed, and the Court of Appeals issued a writ of certiorari to hear the case before the Court of Special Appeals reviewed the matter to determine “if the provisions of the Insurance Code pertaining to unfair trade practices by insurers and their agents provide the exclusive or primary remedy for alleged acts of fraud, negligent misrepresentation, and negligence by an insurer or agent in connection with the sale of insurance.”³⁷

2. *Legal Background.*—

a. *Unfair or Deceptive Practices Prohibited by the Insurance Code.*—In 1947, the Maryland General Assembly enacted a fifteen section subtitle in the Insurance Code titled “Unfair Trade Practices.”³⁸ The purpose of these provisions was:

[T]o regulate trade practices in the business of insurance in accordance with the intent of Congress, . . . by defining, or providing for determination of, all such practices in this state which constitute unfair methods of competition or unfair or deceptive acts or practices and by prohibiting the trade practices so defined or determined.³⁹

The most relevant provisions of the Unfair Trade Practices subtitle are as follows. Article 48A, section 215 provides the general remedy of cease and desist orders for violations of the Unfair Trade Practices subtitle.⁴⁰ Section 215 reads, in pertinent part:

(a) *When issued.*—If, after a hearing thereon of which notice of such hearing and of the charges against him were given in person, the Commissioner finds that any person in this State

34. *Id.* at 57, 706 A.2d at 1066.

35. 105 Md. App. 13, 24, 658 A.2d 1106, 1111 (1995).

36. *Zappone*, 349 Md. at 57, 706 A.2d at 1066. The *Vicente* court expressly held that claims covered by the Unfair Trade Practices Act are exclusive. *Vicente*, 105 Md. App. at 24, 658 A.2d at 1111.

37. *Zappone*, 349 Md. at 50, 706 A.2d at 1062.

38. 1997 Md. Laws ch. 35 (recodified as amended at MD. CODE ANN., INS. §§ 27-101 to -911 (1997)).

39. MD. ANN. CODE art. 48A, § 212 (1994) (recodified as MD. CODE ANN., INS. § 27-101 (1997)). While the Maryland General Assembly has recodified the Insurance Code, the substance has remained largely intact. *Zappone*, 349 Md. at 51, 706 A.2d at 1063.

40. MD. ANN. CODE art. 48A, § 215 (1994) (recodified as MD. CODE ANN., INS. § 27-103 (1997)).

has engaged or is engaging in any act or practice defined in or prohibited under this subtitle, the Commissioner shall order such person to cease and desist from such acts or practices.

. . . .

(c) *Order of Court upon appeal.*—In event of such an appeal, to the extent that the Commissioner's order is affirmed the court shall issue its own order commanding obedience to the terms of the Commissioner's order.

(d) *Effect of order on other liability, penalty or forfeiture.*—No order of the Commissioner pursuant to this section or order of the court to enforce it shall in any way relieve or absolve any person affected by such order from any other liability, penalty, or forfeiture under law.⁴¹

Section 216 allows the Insurance Commissioner to define practices as unfair and/or deceptive that are not actually defined in the subtitle as against public policy.⁴² This section provides for an injunction of the unfair and/or deceptive act if the act has not been discontinued after a final administrative determination.⁴³

Section 217 mainly concerns misrepresentations about insurance policies.⁴⁴ This section prohibits the misrepresentation of terms, benefits or advantages of any policy issued.⁴⁵ False information and advertising that "is untrue, deceptive or misleading" is prohibited by section 218.⁴⁶ According to section 233(e)(1), it is a "fraudulent insurance act for a person to . . . [k]nowingly or willfully make any false or fraudulent statement or representation in or with reference to any application for insurance."⁴⁷ Other sections provide remedial provisions for violations for the section involved.⁴⁸

In addition to the Unfair Trade Practices subtitle, Article 48A, sections 35-40⁴⁹ furnish general administrative and judicial review

41. *Id.*

42. *Id.* § 216 (recodified as MD. CODE ANN., INS. §§ 27-104, -105 (1997)).

43. *Id.*

44. *Id.* § 217 (recodified as MD. CODE ANN., INS. § 27-202 (1997)).

45. *Id.*

46. *Id.* § 218 (recodified as MD. CODE ANN., INS. § 27-203 (1997)).

47. *Id.* § 233(e)(1) (recodified as MD. CODE ANN., INS. § 27-406 (1997)).

48. *See, e.g., id.* § 230A(e) (recodified as MD. CODE ANN., INS. § 27-305 (1997)) (providing that "[t]he commissioner may impose a penalty . . . for each violation of" this section); *Id.* § 233 (recodified as MD. CODE ANN., INS. § 27-406 (1997)) (stating that "[a] person who violates this section is guilty of a misdemeanor"); *Id.* § 234AA(g) (recodified as MD. CODE ANN., INS. § 27-502(g) (1997)) (allowing the fine to be imposed by the commissioner); *Id.* § 234C (recodified as MD. CODE ANN., INS. § 27-501 (1997)) (authorizing the commissioner to order an insurer to accept a particular risk).

49. *Id.* §§ 35-40 (recodified as MD. CODE ANN., INS. §§ 2-210 to -215 (1997)).

remedies that enforce the provisions and principles of the Insurance Code. Moreover, Article 48A, section 55 authorizes the Insurance Commissioner to refuse to issue or renew an insurer's license as well as revoke or suspend that license if the insurer violates any provision of Article 48 or "[k]nowingly fails to comply with any lawful rule, regulation or order of the Commissioner."⁵⁰ Article 48A, section 55A is the monetary penalty provision of the insurance code allowing penalties of not less than one hundred dollars or more than fifty thousand dollars "in lieu of or in addition to revocation or suspension of an insurer's" license.⁵¹

While the above sections illustrate the comprehensiveness of the Insurance Code, no sections specifically address any jurisdictional concerns, specifically whether the Insurance Commissioner has exclusive, primary, or concurrent jurisdiction with the courts for common law claims.

b. Coordinating Administrative Remedies with Judicial Remedies.—When the legislature provides for administrative remedies in specified areas of the law, the question whether alternative judicial remedies are available arises. The answer depends on whether the legislature intended the administrative remedy to be exclusive of,⁵² primary to,⁵³ or concurrent⁵⁴ with judicial remedies.

(1) *When Administrative Remedy is Deemed Exclusive.*—When an administrative remedy is deemed exclusive, the sole authority to provide a remedy lies with the appropriate governmental agency; a judicial action at law or in equity is preempted.⁵⁵ In this instance, a court has no jurisdiction over an action brought by a plaintiff.⁵⁶ Furthermore, when an administrative remedy is exclusive, but provides for a right of judicial review, the "exhaustion of administrative remedies doctrine" requires a claimant to first exhaust the prescribed ad-

50. *Id.* § 55 (recodified as MD. CODE ANN., INS. § 4-113 (1997)).

51. *Id.* § 55A (recodified as MD. CODE ANN., INS. § 4-113(d) (1997)).

52. *White v. Prince George's County*, 282 Md. 641, 653-54, 387 A.2d 260, 267 (1978) (finding that the administrative remedy provided under the Maryland Tax Code is a claimant's exclusive remedy for taxes erroneously paid under mistake of law).

53. *McCullough v. Witter*, 314 Md. 602, 613, 552 A.2d 881, 886 (1989) (noting that when "a plaintiff has both an administrative remedy and an independent judicial action," the administrative action is usually deemed primary).

54. *Maryland-Nat'l Capital Park & Planning Comm'n v. Washington Nat'l Arena*, 282 Md. 588, 386 A.2d 1216 (1978) (finding that the tax appeal tribunals and the courts have concurrent jurisdiction to adjudicate questions of contract construction).

55. *See White*, 282 Md. at 649, 387 A.2d at 265.

56. *Id.*

ministrative procedures to their conclusion before resort to the courts for judicial review of the administrative decision.⁵⁷

To determine whether an administrative remedy is exclusive, the courts normally look to the legislature's intent.⁵⁸ Normally, the courts have held that an administrative remedy will be deemed exclusive when the legislature expressly indicates that the administrative remedy is exclusive or when the claim is created and based on a statutory right and no other recognized alternative common law remedy is available. For example, in *Moats v. City of Hagerstown*,⁵⁹ law enforcement officers were charged with intentionally misrepresenting facts concerning overtime reports.⁶⁰ The officers sought to waive their right to a hearing under the Law Enforcement Officers' Bill of Rights (LEOBOR) and instead pursue a grievance under their collective bargaining agreement.⁶¹ The court held that the procedures of LE-

57. See *id.* ("[W]here the special statutory scheme for relief is exclusive and provides for judicial review of the administrative decision, one must normally exhaust the administrative remedy before recourse to the courts under the judicial review provisions." (citing *Soley v. State Comm'n on Human Relations*, 277 Md. 521, 526, 356 A.2d 254 (1976); *Leatherbury v. Gaylord Fuel Corp.*, 276 Md. 367, 373-76, 347 A.2d 826 (1975))); see also *Maryland-Nat'l Capital*, 282 Md. at 602, 386 A.2d at 1226 (explaining that the exhaustion of administrative remedies doctrine "demands that a party fully pursue administrative procedures before obtaining limited judicial review and contemplates a situation in which the claim asserted is enforceable initially by administrative action *exclusively*" (citing *Mazzola v. Southern New England Tel. Co.*, 363 A.2d 170, 174 (Conn. 1975))). The Court of Appeals has recognized that there are exceptions to the exhaustion of administrative remedies doctrine. The court listed five exceptions to the exhaustion doctrine in *Prince George's County v. Blumberg*, 288 Md. 275, 284-85, 418 A.2d 1155, 1161 (1980). First, the doctrine need not be applied when the legislature has explicitly intended that exhaustion of administrative remedies is not required before the institution of a judicial action. *Id.* at 284, 418 A.2d at 1161 (citing *White*, 282 Md. at 649, 387 A.2d at 265). Second, when there is a direct attack on the authority of the legislative body to pass legislation from which relief is sought, exhaustion is not required. *Id.* at 284-85, 418 A.2d at 1161 (citing *Harbor Island Marina v. Calvert County*, 286 Md. 303, 308, 407 A.2d 738, 741 (1979)). Third, a party is not required to exhaust an administrative agency's remedies when the agency's specified procedures are not authorized. *Id.* at 285, 418 A.2d at 1161 (citing *Stark v. Board of Registration*, 179 Md. 276, 284-85, 19 A.2d 716, 720 (1941)). Fourth, when an agency cannot provide "to any substantial degree a remedy," a party should not have to exhaust the administrative remedy. *Id.* (citing *Poe v. Baltimore City*, 241 Md. 303, 308-09, 216 A.2d 707, 709 (1966)). Lastly, when the issues in the action only tangentially or incidentally involve matters that fall within an agency's expertise but do not, "in any meaningful way, call for or involve applications of its expertise," the exhaustion doctrine need not be invoked. *Id.* (citing *Maryland-Nat'l Capital*, 282 Md. at 594-604, 386 A.2d at 1222-27).

58. *White*, 282 Md. at 649, 387 A.2d at 265 (citing *Maryland-Nat'l Capital*, 282 Md. at 595-96, 386 A.2d at 1216; *Reiling v. Comptroller*, 201 Md. 384, 387-89, 94 A.2d 261 (1953); *Wasena Housing Corp. v. Levay*, 188 Md. 383, 391, 52 A.2d 903 (1947); *Tawes v. Williams*, 179 Md. 224, 228, 17 A.2d 137 (1941)).

59. 324 Md. 519, 597 A.2d 972 (1991).

60. *Id.* at 521, 597 A.2d at 973.

61. *Id.*

OBOR are exclusive.⁶² After examining the language and history of LEOBOR, Judge Eldridge found, *inter alia*, the language in LEOBOR stating that “any local legislation shall be preempted by the subject and material of this subsection” expressly intended LEOBOR to be an officer’s exclusive remedy.⁶³

In *White v. Prince George’s County*,⁶⁴ the Court of Appeals handled a dispute over recordation taxes that were alleged to have been voluntarily but illegally collected in Prince George’s County.⁶⁵ Because there was no recognized alternative judicial action available for taxes voluntarily paid under mistake of law, the court held that if the plaintiffs were entitled to a refund, the Maryland Tax Code would be the exclusive statutory remedy for recovery of special taxes erroneously paid.⁶⁶ In dicta, the court stated that “absent a legislative indication to the contrary, it will usually be deemed that the Legislature intended the special statutory remedy to be exclusive.”⁶⁷

A year after the *White* decision, the Court of Appeals in *Department of Human Resources v. Wilson*⁶⁸ considered whether the Employment Security Administration (ESA) had unlawfully refused to pay weekly unemployment benefits.⁶⁹ In holding that these issues are within the exclusive jurisdiction of the ESA Board of Appeals, the *Wilson* court relied, *inter alia*, on the dicta in *White*, stating that “[o]rdinarily, where

62. *Id.* at 530, 597 A.2d at 977.

63. *Id.* at 527, 597 A.2d at 975-76. Judge Eldridge also reasoned that “when the General Assembly enacts a comprehensive administrative remedial scheme, that administrative remedy is generally deemed exclusive.” *Id.* at 529, 597 A.2d at 977 (citing *Board v. Secretary of Personnel*, 317 Md. 34, 42-43, 562 A.2d 700, 704 (1989); *Clinton v. Board of Educ.*, 315 Md. 666, 678, 556 A.2d 273, 279 (1989); *Maryland-Nat’l Capital Park & Planning Comm’n v. Crawford*, 307 Md. 1, 18, 511 A.2d 1079, 1087 (1986); *Commission on Human Relations v. Mass Transit Auth.*, 294 Md. 225, 230, 449 A.2d 385, 387 (1982); *Maryland Dep’t of Human Resources v. Wilson*, 286 Md. 639, 643-45, 409 A.2d 713, 715-17 (1979)).

64. 282 Md. 641, 387 A.2d 260 (1978).

65. *Id.* at 643, 387 A.2d at 262.

66. *Id.* at 653-54, 387 A.2d at 267. The court examined the history of the common law rule relating to tax refund actions and the statutory provisions for relief. *Id.* at 653, 387 A.2d at 267. It found that plaintiffs had no alternative statutory remedy and no right under the common law to recover money voluntarily paid under a mistake of law. *Id.*

67. *Id.* at 649, 387 A.2d at 265 (citing *State Dep’t of Assessment & Taxation v. Clark*, 281 Md. 385, 401, 380 A.2d 28, 37 (1977); *Dubois v. City of College Park*, 280 Md. 525, 533, 375 A.2d 1098, 1104 (1977); *Soley v. State Comm’n on Human Relations*, 277 Md. 521, 526, 356 A.2d 254, 257 (1976); *Agrarian, Inc. v. Zoning Inspector*, 262 Md. 329, 332, 277 A.2d 591, 592 (1971)).

68. 286 Md. 639, 409 A.2d 713 (1979).

69. *Id.* at 643, 409 A.2d at 716.

a statutory administrative remedy is provided, it will be deemed exclusive."⁷⁰

While both *White* and *Wilson* held the administrative remedy to be exclusive because the statutory scheme authorizing the administrative remedy created the cause of action and no alternative action existed for the plaintiffs, these two cases seemingly added a new presumption that administrative remedies are usually deemed exclusive to alternative judicial remedies.

In contrast to the above cases, in *Travelers Indemnity Co. v. Merling*,⁷¹ the Court of Appeals recognized that an insurance agent terminated by an insurer had an independent action at common law, even though he also had a statutory remedy under section 234B⁷² of the Unfair Trade Practices Act.⁷³ The agent filed an action for conversion and tortious interference with his property rights when the insurer contacted his policyholders prior to the expiration of their policies in order to solicit their business.⁷⁴ The court heard the agent's claims despite the remedies available through section 234B, which provides an agent with rights and remedies regarding termination and continuation of business.⁷⁵

In determining when specific administrative remedies are deemed exclusive in the face of alternative judicial remedies, the courts have also alluded to a distinction between purely statutory remedies and those that constitute common law causes of action. In *Muhl v. Magan (Magan I)*,⁷⁶ a physician complained of an insurance company's failure to underwrite his liability insurance before the Insur-

70. *Id.* (citing *White*, 282 Md. at 649, 387 A.2d at 265; *Scheider v. Pullen*, 198 Md. 64, 68, 81 A.2d 226, 228 (1950)). Many courts following the *White* and *Wilson* decisions have since cited to this reasoning in analyzing the relationship between administrative and judicial remedies, thereby further solidifying this rationale in Maryland jurisprudence. See, e.g., *Board of Educ. v. Secretary of Personnel*, 317 Md. 34, 42, 562 A.2d 700, 704 (1989) ("Ordinarily, where a statutory administrative remedy is provided, it will be deemed to be exclusive."); *Veydt v. Lincoln Nat'l Life Ins. Co.*, 94 Md. App. 1, 12, 614 A.2d 1318, 1324 (1992) ("[A]bsent a legislative indication to the contrary, it will usually be deemed that the Legislature intended a special statutory remedy . . . to be exclusive." (quoting *White*, 282 Md. at 649, 387 A.2d at 265)); *McClellan Contracting Co. v. Maryland Transp. Auth.*, 70 Md. App. 514, 522, 521 A.2d 1251, 1255 (1987) (same).

71. 326 Md. 329, 605 A.2d 83 (1992).

72. MD. ANN. CODE art. 48A, § 234B (1994) (recodified as MD. CODE ANN., INS. § 27-503 (1997)).

73. *Travelers Indem. Co.*, 326 Md. at 339-42, 605 A.2d at 87-89.

74. *Id.* at 333-35, 605 A.2d at 85. Merling contended that this interference caused his former clients not to renew their insurance policies through him. *Id.* at 335, 605 A.2d at 86. He also contended that he, and not Travelers Indemnity, was the exclusive owner of the information collected in regard to his clients. *Id.*

75. *Id.* at 336-42, 605 A.2d at 86-89.

76. 313 Md. 462, 545 A.2d 1321 (1988).

ance Commissioner.⁷⁷ The claim, if proven, would fall under the Unfair Trade Practices subtitle addressed in the Insurance Code.⁷⁸ Judge Rodowsky, writing for the court, said Magan had no contract with the insurance company and that Magan's requested relief to compel the insurance company to enter into a contract with him was a "form of relief generally unknown to the common law."⁷⁹ The only remedy available to Magan was the exclusive remedy created by the Maryland General Assembly involving situations whereby insurers who decline to accept a particular risk may be in violation of Article 48A, sections 234A and 234C⁸⁰ of the Unfair Trade Practices subtitle.⁸¹ The court recognized that "where the General Assembly has provided a special form of remedy and has established a statutory procedure before an administrative agency for a special kind of case, a litigant must ordinarily pursue that form of remedy and not bypass the administrative official."⁸²

(2) *Administrative Remedy is Deemed to be Primary to Judicial Remedy*—The doctrine of primary jurisdiction is a "judicially created rule designed to coordinate the allocation of functions between courts and administrative bodies," and applies only when there is a statutorily created administrative remedy as well as an alternative judicial remedy available to redress a particular wrong.⁸³ When the legislature delegates authority to an administrative agency to provide specified remedies for the violation of statutorily created rights, the courts use the doctrine to determine whether a litigant is first required to pursue a remedy with the administrative agency before a remedy can be had in

77. *Id.* at 469-70, 545 A.2d at 1325.

78. *Id.* at 465-77, 545 A.2d at 1322-28.

79. *Id.* at 480, 545 A.2d at 1330.

80. MD. ANN. CODE art. 48A, §§ 234A, 234C (1994) (recodified as MD. CODE ANN., INS. §§ 27-501, 27-505 (1997)).

81. *Magan I*, 313 Md. at 480, 545 A.2d at 1330.

82. *Id.* (citing *Prince George's County v. Blumberg*, 288 Md. 275, 418 A.2d 1155 (1980)).

83. See *Maryland-Nat'l Capital Park & Planning Comm'n v. Washington Nat'l Arena*, 282 Md. 588, 601, 386 A.2d 1216, 1225-26 (1978) (citing *Nader v. Allegheny Airlines, Inc.*, 426 U.S. 290, 303 (1976); *United States v. Western Pac. R.R. Co.*, 352 U.S. 59, 63 (1956)); see also *Maryland House of Correction v. Fields*, 348 Md. 245, 257-58, 703 A.2d 167, 173-74 (1997) (noting that the primary jurisdiction doctrine was judicially created to allocate functions between the courts and administrative agencies and comes into play when the court and agency have concurrent jurisdiction over the matter (citing *Washington Suburban Sanitary Comm'n v. Mitchell & Best*, 303 Md. 544, 561-62, 495 A.2d 30, 39 (1985))). See generally Michael Botein, *Primary Jurisdiction: The Need for Better Court/Agency Interaction*, 29 RUTGERS L. REV. 867 (1976) (discussing how the doctrine of primary jurisdiction coordinates the interaction between courts and agencies and how this interaction can be made more efficient).

the courts.⁸⁴ Typically, newly created agencies mean the addition of newly created legal authority, with no explicit abridgment of the pre-existing power of the courts over common law remedies previously available to redress a wrong now dealt with by statute.⁸⁵ The doctrine is thus invoked when both the agency and the judiciary have "concurrent jurisdiction over the same matter and there is no statutory provision to coordinate the work of the court with that of the agency."⁸⁶ In this situation, the courts ordinarily implement the doctrine to allocate initial decision-making responsibility to agencies for an action that "raises issues or relates to subject matter falling within the special expertise of an administrative agency."⁸⁷ As a result, there is a presumption that an administrative remedy is intended to have primary jurisdiction to alternative judicial remedies.⁸⁸

The Court of Appeals applied the doctrine of primary jurisdiction in *Clinton v. Board of Education*.⁸⁹ Parents filed a complaint against the Howard County School Board seeking interlocutory and permanent injunctive relief to enjoin the school board from displacing or reassigning their children, who were nonresidents of the county, from the elementary school they were attending.⁹⁰ The school board filed a counterclaim seeking to recover the children's school tuition because

84. *Maryland-Nat'l Capital*, 282 Md. at 599-600, 386 A.2d at 1224-25.

85. 2 KENNETH CULP DAVIS, ADMINISTRATIVE LAW TREATISE § 22:1, at 81 (2d ed. 1983) (discussing the nature and function of primary jurisdiction).

86. *Maryland-Nat'l Capital*, 282 Md. at 601, 386 A.2d at 1226 (citation omitted) (citing *Mordhorst v. Egert*, 223 N.W.2d 501, 504 (S.D. 1974); *Mercury Motor Express, Inc. v. Brinke*, 475 F.2d 1086, 1091 (5th Cir. 1973)).

87. *Id.* at 602, 386 A.2d at 1226 (citing *Western Pacific*, 352 U.S. at 63-64); *Writers Guild of Am., West, Inc. v. F.C.C.*, 423 F. Supp. 1064, 1089-90 (C.D. Cal. 1976); Louis L. Jaffe, *Primary Jurisdiction Reconsidered: The Antitrust Laws*, 102 U. PA. L. REV. 577, 579 (1954)). In addition, when an agency's remedy "is deemed primary, it is appropriate for the trial court to retain . . . jurisdiction over the independent judicial action pending invocation and exhaustion of the administrative procedures." *McCullough v. Wittner*, 314 Md. 602, 613, 552 A.2d 881, 886 (1989) (citing *Maryland-Nat'l Capital Park & Planning Comm'n v. Crawford*, 307 Md. 1, 18, 511 A.2d 1079, 1087 (1986); *Board of Educ. v. Hubbard*, 305 Md. 774, 792-93, 506 A.2d 625, 634 (1986)).

88. *Fields*, 348 Md. at 257, 703 A.2d at 174 ("[W]here there is a pre-existing common-law or statutory judicial remedy for the same matter, and where the legislature fails to specify which remedy is primary, the usual legal presumption is that the administrative remedy is primary and must be 'first invoked and followed' before resort to the courts"); *Maryland Reclamation Assoc., Inc. v. Harford County*, 342 Md. 476, 493, 677 A.2d 567, 576 (1996) ("[T]his Court has 'ordinarily construed the pertinent [legislative] enactments to require that the administrative remedy be first invoked and followed' before resort to the courts."); *Hubbard*, 305 Md. at 786, 506 A.2d at 631 ("[W]e have ordinarily construed the pertinent enactments to require that the administrative remedy be first invoked and followed.").

89. 315 Md. 666, 556 A.2d 273 (1989).

90. *Id.* at 668-70, 556 A.2d at 274-75.

the children did not meet the residency requirements in the county.⁹¹ Plaintiffs contended that charging tuition is repugnant to the Education Article of the Maryland Code, which requires a general system of free public schools.⁹² The issue was whether the Maryland State Board of Education or the courts should first interpret the Maryland Constitution in reference to education.⁹³ Under the primary jurisdiction doctrine, the Court of Appeals held that the Board of Education would be given the initial opportunity to consider whether the issue of charging nonresident children tuition is repugnant to the Maryland constitution.⁹⁴ The court explained that it has been confronted in the past with issues that are within the jurisdiction of an agency as well as that of the court and that “[o]rdinarily, when there are two forums available, one judicial and the other administrative, each able to afford essentially the same remedy, and no statutory directive indicating which should be pursued first, a party is often first required to run the administrative remedial course before seeking a judicial solution.”⁹⁵

(3) *Administrative Remedy Deemed to be Concurrent with an Alternative Judicial Remedy.*—When an administrative remedy is deemed to be concurrent with an alternative judicial remedy, a claimant may pursue an independent judicial remedy without first invoking and exhausting the statutorily prescribed administrative remedy.⁹⁶ Despite the presumption that when both an administrative remedy and an alternative judicial remedy are available it is presumed that the administrative remedy is primary to the judicial remedy,⁹⁷ this presumption is rebuttable, and often courts will find that the administrative and judicial remedies are fully concurrent.⁹⁸ When a court is trying to determine if an administrative remedy is concurrent with, rather than

91. *Id.* at 670, 556 A.2d at 275.

92. *Id.* at 671, 556 A.2d at 276.

93. *Id.*

94. *Id.* at 668, 556 A.2d at 274.

95. *Id.* at 678, 556 A.2d at 279 (citing *Maryland-Nat'l Capital Park & Planning Comm'n v. Washington Nat'l Arena*, 282 Md. 588, 601, 386 A.2d 1216, 1226 (1978); *Department of Human Resources v. Wilson*, 286 Md. 639, 645, 409 A.2d 713, 717 (1979)).

96. See *Maryland-Nat'l Capital Park & Planning Comm'n v. Crawford*, 307 Md. 1, 23, 511 A.2d 1079, 1090 (1986).

97. See cases cited at *supra* note 88.

98. See *Maryland House of Correction v. Fields*, 348 Md. 245, 258, 703 A.2d 167, 174 (1997) (noting that the Court of Appeals has on occasion “held that the administrative remedy is not primary and that resort may be had to the concurrent judicial remedy without invoking or exhausting the administrative procedures”); *Maryland Nat'l Capital*, 282 Md. at 596, 386 A.2d at 1223 (finding that the legislature did not intend “to endow tax appeal tribunals with authority, to the exclusion of courts of ordinary jurisdiction, to determine the validity” of a lease agreement’s noncontestability clause).

primary to, a judicial remedy, the court may sometimes look to the comprehensiveness of the statutory scheme,⁹⁹ the agency's interpretation of the statute it is entitled to administer,¹⁰⁰ or the nature of the alternative judicial cause of action pursued by the plaintiff.¹⁰¹

In *Maryland-National Capital Park & Planning Commission v. Crawford*,¹⁰² the court examined whether a plaintiff was required to pursue

99. See *Department of Human Resources v. Wilson*, 286 Md. 639, 645, 409 A.2d 713, 717 (1979) ("[W]hen the Legislature enacts a comprehensive remedial scheme . . . , trial courts generally should not act until there has been compliance with the statutory comprehensive remedial scheme.").

100. In *National Asphalt Pavement Ass'n, Inc. v. Prince George's County*, 292 Md. 75, 437 A.2d 651 (1981), the court gave deference to the agency that was charged with administering and enforcing the state legislation prohibiting employment discrimination. *Id.* at 80, 437 A.2d at 653-54. Because the Maryland Commission on Human Relations (MHRC) had continuously operated on the premise that the legislature did not intend it to preempt the field of employment discrimination, the court reasoned that the administrative remedies provided by the MHRC are concurrent with judicial remedies. *Id.*

The weight actually given to an agency's interpretation was tackled in *Baltimore Gas & Electric Co. v. Public Service Commission*, 305 Md. 145, 501 A.2d 1307 (1986). The court found that the weight accorded to an agency's interpretation of a statute depends upon a number of considerations. *Id.* at 161, 501 A.2d at 1315. First, an agency's interpretation should be given more weight "when the interpretation has been applied consistently and for a long period of time." *Id.* When an agency has "engaged in a process of reasoned elaboration in formulating its interpretation of the statute," the agency's interpretation should be given additional weight. *Id.* at 161-62, 501 A.2d at 1315. Lastly, if the agency's interpretation of the statute is the product of neither contested adversarial proceedings nor formal rule promulgation, the interpretation is entitled little weight. *Id.* at 162, 501 A.2d at 1315.

101. See *Board of Educ. v. Hubbard*, 305 Md. 774, 791, 506 A.2d 625, 633 (1962) ("[W]e have held that a concurrent judicial remedy may be pursued without the necessity of invoking and exhausting a statutorily prescribed administrative remedy [when] the legal issue did not involve an interpretation of a law administered by the agency."). The Court of Appeals determined that tax appeal tribunals and the courts have concurrent jurisdiction in the interpretation of contract provisions in *Maryland-National Capital Park & Planning Commission v. Washington National Arena*, 282 Md. 588, 600, 386 A.2d 1216, 1225 (1978). *Maryland-National Capital* involved whether a lessee could voluntarily agree to relinquish his statutory right to appeal a determination that improvements on demised premises were taxable. *Id.* at 591, 386 A.2d at 1220. The court found that the Maryland legislature did not intend to endow the tax appeal tribunals with exclusive authority to determine the validity of a noncontestability clause of a lease agreement. *Id.* at 600, 386 A.2d at 1025. The court reasoned that the enforceability of the waiver provision did not arise under the tax statutes, but rather was a question of contract construction. *Id.* at 598, 386 A.2d at 1224. The court continued:

[T]he fact that an agency may be empowered to decide a legal question that is encompassed by its incidental jurisdiction does not, absent a contrary indication from the Legislature, necessarily deprive the courts of all authority to adjudicate a point of law they could otherwise decide. And certainly no one would doubt the power of the courts of general jurisdiction in this state to construe, interpret and enforce provisions of contracts, leases, and other written instruments.

Id. at 598-99, 386 A.2d at 1224.

102. 307 Md. 1, 511 A.2d 1079 (1986).

and exhaust administrative remedies available under the employment discrimination provisions of the Maryland Code with the Maryland Human Relations Commission (MHRC) prior to filing her employment discrimination case.¹⁰³ The plaintiff, Crawford, brought a suit under 42 U.S.C. § 1983¹⁰⁴ and the Maryland Constitution alleging that her employer, Capital Park, had denied her an employment transfer because of her race.¹⁰⁵ Defendants contended that because the Maryland Code created a statutory right against discrimination and provided an appropriate administrative remedy with the MHRC for any alleged violations of that right, the plaintiff must first invoke and pursue the available administrative remedy before resort to the courts.¹⁰⁶ The court noted that the presumption that an administrative remedy should ordinarily be invoked and exhausted before resort to an independent judicial remedy is based partially upon an inference of the comprehensiveness of the statutorily created scheme.¹⁰⁷ However, after determining that the remedial provisions of the MHRC were not as comprehensive as other administrative remedies in the Maryland Code, the court concluded that the legislature did not intend an employee to first invoke and exhaust the administrative procedures.¹⁰⁸ Furthermore, the court reasoned that the plaintiff's action did not involve an interpretation of any part of the Human Relations Commission Article of the Maryland Code, but an interpretation of the Equal Protection Clause of the Fourteenth Amendment; the administrative remedy was deemed concurrent with judicial remedies.¹⁰⁹

c. Past Case Law Interpreting the Jurisdiction of the Unfair Trade Practices Subtitle of the Insurance Code.—In *Magan v. Medical Mutual Liability Insurance Society (Magan II)*,¹¹⁰ the Court of Special Appeals held that an individual cannot maintain, in addition to a statutory remedy, a tort action for damages in circuit court based upon the same issues advanced or that should have been advanced in the administrative

103. *Id.* at 30, 511 A.2d at 1094.

104. 42 U.S.C. § 1983 (1994) (providing a civil remedy for the deprivation of rights, privileges, or immunities secured by the United States Constitution and laws).

105. *Crawford*, 307 Md. at 4, 511 A.2d at 1080.

106. *Id.* at 10, 511 A.2d at 1083.

107. *Id.* at 25-26, 511 A.2d at 1091.

108. *Id.* at 26, 511 A.2d at 1092. The court stated that "the matter of employment discrimination is dealt with by five relatively brief sections . . . which do not comprehensively cover the entire field." *Id.* at 26, 511 A.2d at 1092 (quoting *National Asphalt Pavement Ass'n v. Prince George's County*, 292 Md. 75, 79, 437 A.2d 651, 653 (1981)).

109. *Id.* at 25, 511 A.2d at 1091.

110. 81 Md. App. 301, 567 A.2d 503 (1989).

proceeding.¹¹¹ Appellant, a physician, brought a separate tort action against his insurer alleging that the insurer's failure to insure him constituted a breach of duty under section 234A(a) of the Maryland Insurance Code.¹¹² This statutory claim was also pending before the Insurance Commissioner.¹¹³ The court found that the appellant should not be able to circumvent any administrative remedy by pursuing a separate claim for damages because his "factual predicate for his tort claims are founded on a statutory violation which carries with it a statutory remedy"; no recognized alternative remedy existed under common law principles.¹¹⁴ The court also noted that the Insurance Code is comprehensive and establishes a uniform method of appeal for those harmed by an insurer's violations.¹¹⁵

In *Veydt v. Lincoln Life Insurance Co.*,¹¹⁶ the Court of Special Appeals concluded that an agent suing an insurer for terminating an at-will insurance agency agreement is generally a matter to be resolved under the Insurance Code.¹¹⁷ After terminating the plaintiff's agency agreement, the insurance company notified policyholders that the agency relationship had been terminated and informed them that they had the right to continue with their policies under the appellee's policies.¹¹⁸ The agent alleged common law claims at the trial court level that this notice to policyholders constituted a type of invasion of privacy (false light) and "tortious interference with business relationships."¹¹⁹ The *Veydt* court used the trial court's reasoning that the termination letters, which were the basis of Veydt's claims, are so intricately combined with the act of termination that they cannot constitute a separate cause of action.¹²⁰ The trial court further stated that if a common law claim can be asserted from a letter of termination,

111. *Id.* at 303, 567 A.2d at 504.

112. MD. ANN. CODE art. 48A, § 234A(a) (1994) (recodified as MD. CODE ANN., INS. § 27-501 (1997)). Section 234A(a) provides in pertinent part:

No insurer . . . shall . . . refuse to underwrite . . . a particular insurance risk . . . for any reason based in whole or in part upon race, color, creed, sex, or blindness of an applicant or policyholder or for any arbitrary, capricious, or unfairly discriminatory reason No insurer . . . may cancel or refuse to underwrite or renew a particular insurance risk or class of risk except by the application of standards which are reasonably related to the insurer's economic and business purposes.

Id.

113. *Magan II*, 81 Md. App. at 307-09, 567 A.2d at 506-07.

114. *Id.* at 308, 567 A.2d at 506.

115. *Id.* at 307, 567 A.2d at 506.

116. 94 Md. App. 1, 614 A.2d 1318 (1992).

117. *Id.* at 20-21, 614 A.2d at 1328.

118. *Id.* at 3, 614 A.2d at 1319.

119. *Id.*

120. *Id.* at 4, 614 A.2d at 1320.

which states only a fact of termination, as required by Maryland Article 48A, section 234B, that subsection would have no validity.¹²¹ Moreover, the court found that the legislature had intended section 234B to be exclusive because it had authorized the Insurance Commissioner to be fully charged with the responsibility to remedy violations of Article 48A, and because section 234B provides a complete procedure and remedy.¹²²

In *Vicente v. Prudential Insurance Co.*,¹²³ the Court of Special Appeals held that the administrative remedies set forth in the Unfair Trade Practices subtitle are exclusive.¹²⁴ *Vicente* involved two insureds who brought a common law tort action against a health insurer and its agent based on the agent's alleged misrepresentations that the health insurer was licensed to sell health insurance in Maryland and that the insurer met the capitalization requirements imposed by the Insurance Code and regulations.¹²⁵ While the plaintiffs acknowledged that the Unfair Trade Practices subtitle of the Insurance Code prohibited the wrongs alleged in the complaint, they did not invoke their administrative remedy and instead pursued a remedy in court, arguing that although the commissioner had jurisdiction, the plaintiffs were not required to "exhaust the administrative remedies" under the Insurance Code before maintaining their common law tort action.¹²⁶ The plaintiffs contended that the language of section 215(d) of the Insurance Code clearly indicates that the legislature did not intend remedies under the Insurance Code to be exclusive.¹²⁷ The Court of Special Appeals disagreed, holding that the exclusive remedies for the wrongs alleged by the plaintiff were those set forth in the Unfair Trade Practices subtitle.¹²⁸ The intermediate court's decision was based on the "general exhaustion of remedies rule" that "where a statute provides a special form of remedy, the plaintiff must use that

121. *Id.*

122. *Id.* at 6, 19, 614 A.2d at 1321, 1328.

123. 105 Md. App. 13, 658 A.2d 1106 (1995), *overruled by Zappone*, 349 Md. at 66, 706 A.2d at 1071.

124. *Id.* at 23-24, 658 A.2d at 1111.

125. *Id.* at 15, 658 A.2d at 1107. The plaintiffs contended that the misrepresentations resulted in damages because the health insurance policy paid no part of their hospitalization or medical expenses, totaling \$23,181.40, while the policy was in effect. *Id.* The complaint alleged negligent misrepresentation, fraud and constructive fraud. *Id.*

126. *Id.* at 18, 658 A.2d at 1108-09.

127. *Id.* Section 215(d) states: "No order of the Commissioner pursuant to this section or order of court to enforce it shall in any way relieve or absolve any person affected by such order from any other liability, penalty, or forfeiture under the law." MD. ANN CODE art. 48A, § 215(d) (1994) (recodified as MD. CODE ANN., INS. § 27-103(e) (1997)).

128. *Vicente*, 105 Md. App. at 23-24, 658 A.2d at 1111.

form [of remedy] rather than any other.”¹²⁹ Relying on its decisions in *Magan II*,¹³⁰ *Veydt v. Lincoln National Life Insurance Co.*,¹³¹ and the Court of Appeals’s decision of *Magan I*,¹³² the court found that the Maryland Insurance Code did provide a “special form of remedy” for the plaintiffs. Accordingly, the only remedies the plaintiffs could pursue were those provided by the Insurance Code.¹³³

The *Vicente* court relied on the language of *Magan I*¹³⁴ and *Magan II* that concluded the Unfair Trade Practices subtitle is comprehensive,¹³⁵ and that when there is a special statutory remedy and procedure before an “agency for a special kind of case, a litigant must ordinarily pursue that form of remedy and not bypass the administrative official.”¹³⁶ The *Vicente* court concluded because all three cases involved issues within the purview of the Unfair Trade Practices Act of the Insurance Code, and because in *Magan II* and *Veydt* the court held that the legislature intended the remedies set forth in section 55A to be exclusive, that tortious conduct of an insurer must also fall within the exclusive jurisdiction of the Insurance Code.¹³⁷

3. *The Court’s Reasoning.*—In *Zappone v. Liberty Life Insurance Co.*, the Court of Appeals held that the Maryland General Assembly did not intend “to preclude claimants from pursuing a recognized independent tort remedy” for fraud, negligence, and negligent misrepresentation “without first invoking and exhausting the administrative remedy under the Unfair Trade Practices subtitle of the Insurance Code.”¹³⁸ The opinion explicitly overruled *Vicente*, which held that the remedies set forth in the Unfair Trade Practices subtitle are “exclusive.”¹³⁹

The issue in *Zappone*, as stated by the court, was whether “the provisions of the Insurance Code pertaining to unfair trade practices by insurers and their agents provide the exclusive or primary remedy for

129. *Id.* at 16, 658 A.2d at 1107 (quoting *Bits ‘N’ Bytes Computer Supplies, Inc. v. Chesapeake & Potomac Tel. Co.*, 97 Md. App. 557, 573, 631 A.2d 485 (1993) (citing *Solely v. State Comm’n on Human Relations*, 277 Md. 521, 526, 356 A.2d 254 (1976))).

130. 81 Md. App. 301, 567 A.2d 503 (1989).

131. 94 Md. App. 1, 614 A.2d 1318 (1992).

132. 313 Md. 462, 545 A.2d 1321 (1988). See *supra* notes 76-82 and accompanying text (discussing *Magan I*).

133. *Vicente*, 105 Md. App. at 23-24, 658 A.2d at 1111.

134. See *supra* notes 76-82 and accompanying text (discussing *Magan I*).

135. *Vicente*, 105 Md. App. at 20-22, 658 A.2d at 1109-11 (citing *Magan I*, 313 Md. at 465-68, 545 A.2d at 1322-24; *Magan II*, 81 Md. App. at 307, 567 A.2d at 506).

136. *Id.* at 20, 658 A.2d at 1110 (quoting *Magan I*, 313 Md. at 480, 545 A.2d at 1330).

137. *Id.* at 23-24, 658 A.2d at 1111.

138. *Zappone*, 349 Md. at 68, 706 A.2d at 1071.

139. *Id.* at 66, 706 A.2d at 1071 (citing *Vicente*, 105 Md. App. at 24, 658 A.2d at 1111).

alleged acts of fraud, negligent misrepresentation, and negligence by an insurer or agent in connection with the sale of insurance.”¹⁴⁰ To resolve this question, Judge Eldridge, writing for a unanimous court, began by articulating the three possible relationships between an administrative remedy and a judicial remedy,¹⁴¹ noting that the question of which relationship applies to a particular administrative remedy is “ordinarily a question of legislative intent.”¹⁴² While the legislature occasionally sets forth its intent as to whether an administrative remedy is to be exclusive, primary, or concurrent, no such intention was expressly set forth in the Insurance Code.¹⁴³ The court noted, however, that various principles have been developed and applied to resolve the question in the absence of an express legislative intent.¹⁴⁴

The court set forth the following principles: (1) “[o]rdinarily a statutory administrative and judicial review remedy will be treated as exclusive only when the Legislature has indicated that the remedy is exclusive or when there exists no other recognized alternative statutory, common law, or equitable cause of action;”¹⁴⁵ (2) “where neither the statutory language nor the legislative history disclose an intent that the administrative remedy is to be exclusive, and where there is an alternative judicial remedy under another statute or under common law or equitable principles, there is no presumption that the administrative remedy was intended to be exclusive,” but rather “a presumption that the administrative remedy is intended to be primary, and that a claimant cannot maintain the alternative judicial action without first invoking and exhausting the administrative remedy;”¹⁴⁶ and (3) “the presumption that the Legislature intended

140. *Id.* at 50, 706 A.2d at 1062.

141. *Id.* at 60-61, 706 A.2d at 1067-68. An administrative remedy may be exclusive of, primary to, or fully concurrent with an alternative judicial remedy. *See supra* notes 52-54.

142. *Zappone*, 349 Md. at 60-61, 706 A.2d at 1067-68 (citing *Maryland Reclamation Assoc., Inc. v. Harford County*, 342 Md. 476, 493, 677 A.2d 567, 576 (1996)).

143. *Id.* at 61-62, 706 A.2d at 1068 (noting that “most often statutes fail to specify the category in which an administrative remedy falls”).

144. *Id.* at 62, 706 A.2d at 1068.

145. *Id.*

146. *Id.* at 63, 706 A.2d at 1069 (citations omitted). The court noted that there is dicta to the contrary. *Id.* (citing *Department of Human Resources v. Wilson*, 286 Md. 639, 643-44, 409 A.2d 713, 716 (1979); *White v. Prince George’s County*, 282 Md. 641, 649, 387 A.2d 260, 265 (1978)). Although only briefly mentioned in a footnote, but of extreme significance, the court corrected a presumption in *Department of Human Resources v. Wilson* and *White v. Prince George’s County*. *Id.* at 63 n.7, 706 A.2d at 1069 n.7. The court held that the statement in *Wilson* that when a statutory remedy is provided, it is deemed exclusive, is incorrect. *Id.* The court noted that some courts inadvertently substituted the word “exclusive” for “primary.” *Id.*

the administrative remedy to be primary [where an alternative judicial remedy exists] is rebuttable."¹⁴⁷

The court listed several factors to be considered in determining whether an administrative remedy is primary to or fully concurrent with alternative judicial remedies: (1) "any indications of legislative intent reflected in the statutory language, the statutory framework, or the legislative history" of the statute;¹⁴⁸ (2) "[t]he comprehensiveness of the administrative remedy";¹⁴⁹ (3) "the administrative agency's view of its own jurisdiction";¹⁵⁰ and of most importance, (4) "the nature of the alternative judicial cause of action pursued by the plaintiff."¹⁵¹

Using these principles as guides, the court first found that the remedies provided by the Insurance Code for the alleged acts of fraud by the defendants were not the exclusive remedies available to the plaintiffs.¹⁵² In support of its conclusion, the court stated that "[n]either the Unfair Trade Practices subtitle nor the general remedial provisions of the Insurance Code contain any language indicating that the administrative remedies there provided for are exclusive,"¹⁵³ and found that the plaintiffs had "set forth recognized common law causes of action" against the defendants.¹⁵⁴

Having resolved this question, the court still faced the question whether the administrative remedies provided by the Insurance Code were primary to the alternative judicial remedies the plaintiffs

147. *Id.* at 64, 706 A.2d at 1069.

148. *Id.*, 706 A.2d 1069-70 (citing *National Asphalt Pavement Ass'n v. Prince George's County*, 292 Md. 75, 79, 437 A.2d 651, 653 (1981); *Maryland Nat'l Capital Park & Planning Comm'n v. Washington Nat'l Arena*, 282 Md. 588, 596-97, 386 A.2d 1216, 1223-24 (1978)).

149. *Id.*, 706 A.2d at 1070 (noting that "a very comprehensive administrative remedial scheme is some indication that the Legislature intended the administrative remedy to be primary").

150. *Id.* at 65, 706 A.2d at 1070.

151. *Id.* With regard to this factor the court stated:

Where that judicial cause of action is wholly or partially dependent upon the statutory scheme which also contains the administrative remedy, or upon the expertise of the administrative agency, the Court has usually held that the administrative remedy was intended to be primary and must first be invoked and exhausted before resort to the courts.

Id.

152. *Id.* at 66-67, 706 A.2d at 1071.

153. *Id.*

154. *Id.* at 67, 706 A.2d at 1071 ("[T]he cause of action provided by the Insurance Code was not the only recognizable cause of action encompassing the plaintiff's claims."); *see id.* at 62, 706 A.2d at 1068 ("Ordinarily a statutory administrative and judicial review remedy will be treated as exclusive only when the Legislature has indicated that the administrative remedy is exclusive or when there exists no other recognized alternative statutory, common law, or equitable causes of action." (citations omitted)).

sought.¹⁵⁵ In making this determination, the court found that the statutory language of the Unfair Trade Practices subtitle suggested that the administrative remedy was concurrent.¹⁵⁶ Subsection (d) of section 215 of the Insurance Code states that no administrative order shall “in any way relieve” any person “from any other liability . . . under law.”¹⁵⁷ This language, the court reasoned, indicates that the legislature did not intend the remedies provided to be exclusive of or primary to judicial remedies.¹⁵⁸ Next, even recognizing that the Unfair Trade Practices subtitle of the Insurance Code is “somewhat comprehensive, no prior decision by [the Court of Appeals] has viewed those provisions as sufficiently all-encompassing so as to preclude resort to a fully independent common law remedy.”¹⁵⁹ Furthermore, the court noted, the Insurance Commissioner does not view the administrative remedy under the Unfair Trade Practices subtitle to be primary.¹⁶⁰ In addition, and most importantly, because the plaintiffs asserted claims totally dependent upon common law tort principles, no interpretation by the Insurance Code is involved.¹⁶¹ Thus, resort to the expertise of the Insurance Commissioner to interpret the Insurance Code or its regulations would be irrelevant.¹⁶² The courts are equally qualified to interpret common law tort claims sounding in deceit and negligence.¹⁶³

Accordingly, the court held that the “circuit court erred in holding that the plaintiffs were required to invoke and exhaust their administrative remedies under the Insurance Code.”¹⁶⁴

155. *Id.* at 67-68, 706 A.2d at 1071.

156. *Id.* at 68, 706 A.2d at 1071.

157. MD. ANN. CODE art. 48A, § 215(d) (1994) (recodified as MD. CODE ANN., INS. § 27-103(e) (1997)).

158. *Zappone*, 349 Md. at 68, 706 A.2d at 1071.

159. *Id.* at 67, 706 A.2d at 1071.

160. *Id.* at 67-68, 706 A.2d at 1071. The Maryland Insurance Commissioner submitted an amicus brief in support of Zappone’s position. *Id.* at 59 n.4, 706 A.2d at 1067 n.4. The brief asserted that the Court of Special Appeals’s decision in *Vicente v. Prudential Insurance Co. of America*, 105 Md. App. 13, 658 A.2d 1106 (1995), is inconsistent with prior decisions of the Court of Appeals and the statutory language of the Insurance Code. *Zappone*, 349 Md. at 59 n.4, 706 A.2d at 1067 n.4. The Commissioner urged that the Unfair Trade Practices subtitle of the Insurance Code does not supersede a claimant’s right to sue an insurer for alleged tortious conduct or breach of contract arising out of the purchase of insurance. *Id.* The Commissioner further argued that when the legislature does not expressly indicate that an administrative remedy is to be exclusive or primary, and a claimant has alternative judicial causes of action under the common law, “the plaintiff has a choice as to which remedy to pursue.” *Id.*

161. *Zappone*, 349 Md. at 67, 706 A.2d at 1071.

162. *Id.*

163. *Id.*

164. *Id.* at 66, 706 A.2d at 1070-71.

4. *Analysis*.—In *Zappone*, the Court of Appeals held that common law causes of action run concurrent with administrative remedies for actions falling under the Unfair Trade Practices subtitle of the Maryland Insurance Code.¹⁶⁵ The dispositive issue in *Zappone* was determining when an administrative remedy is to be exclusive, primary, or fully concurrent with alternative judicial remedies.¹⁶⁶ While there is no fixed formula for making such a determination, the court provided a practical framework for guiding this and future decisions. The newly enunciated roadmap will increase clarity, quality, and efficiency in the decision making process, decrease the potential for conflicts among legal institutions, and avoid undue delay in resolving disputes between parties. However, since these qualities overlap, it will be better to analyze each guidepost set forth by the court individually.

First, the *Zappone* court clarified that a statutory remedy will only be viewed as exclusive when the legislature explicitly states the intended remedy is exclusive or when no other recognized alternative statutory, common law, or equitable remedy exists.¹⁶⁷ This presumption is not necessarily new, but it is the first time that it has been announced in such explicit terms. Past case law, such as *Magan I* and *Magan II*, alluded to the fact that the administrative remedy was exclusive only because there was no other remedy available.¹⁶⁸ Furthermore, *Magan I* and *Magan II*, where there was only a statutory remedy available, are now easily reconciled with *Travelers Indemnity* because in the latter case, there were alternative judicial remedies available.¹⁶⁹

The court also corrected the rationale in *Wilson* and *White* that “absent a legislative indication to the contrary, it will usually be deemed that the Legislature intended the special statutory remedy to

165. *Id.* at 68, 706 A.2d at 1071.

166. *Id.* at 58-60, 706 A.2d at 1066-68.

167. *Id.* at 62, 706 A.2d at 1068; see *Bowman v. Goad*, 348 Md. 199, 202, 703 A.2d 144, 146 (1997) (concluding that when “no common law action lies for the recovery of taxes or governmental fees which the plaintiff has voluntarily paid under a mistake of law . . . any statutorily prescribed [administrative] refund remedy is exclusive”); *Insurance Comm’n v. Equitable Life Assurance Soc’y of the United States*, 339 Md. 596, 623, 664 A.2d 862, 876 (1995) (holding that “where the only avenue for relief is the statutorily prescribed administrative [remedy,]” that is a claimant’s “exclusive remedy”); *Muhl v. Magan*, 313 Md. 462, 480, 545 A.2d 1321, 1330 (1988) (finding that when a claimant seeks “a form of relief generally unknown to the common law,” and the only available remedy is an administrative remedy, that remedy is deemed to be exclusive).

168. See *supra* notes 76-82 and accompanying text (indicating that, in order to bypass an available administrative remedy, one must pursue a recognized alternative remedy under common law principles).

169. See *supra* notes 71-75 and accompanying text (reviewing common law actions allowed even though the claimants had available administrative remedies).

be exclusive.”¹⁷⁰ By concluding that some Maryland opinions may have inadvertently substituted the word “exclusive” for “primary,”¹⁷¹ the court reconciled cases that ruled on common law claims in the face of a comprehensive statutory remedial scheme.¹⁷² Judge Eldridge further emphasized when a claimant has both an administrative remedy and an alternative judicial remedy, in the absence of statutory language or history to the contrary, there is no presumption that the administrative remedy is deemed exclusive.¹⁷³ Thus, cases that have cited to *White* or *Wilson* are now suspect in light of the *Zappone* decision.¹⁷⁴

The *Zappone* court’s clarification regarding the potential avenues for relief will prevent parties from spending time and effort trying a case before the wrong tribunal. Judicial efficiency is served; parties will not waste time by trying cases that should have been properly brought in another jurisdiction. There is also a practical standpoint: if the only remedy currently available is a special statutory remedy, that remedy should be followed.¹⁷⁵ Jurisdictional conflicts between legal institutions will not arise if the claimant cannot pursue a possible alternative remedy.¹⁷⁶ The refusal to find a presumption may also belie the court’s hesitation to relinquish any of its decisional autonomy in favor of an agency.¹⁷⁷

170. *White v. Prince George’s County*, 282 Md. 641, 649, 387 A.2d 260, 265 (1978); see also *Department of Human Resources v. Wilson*, 286 Md. 639, 643-644, 409 A.2d 713, 716 (1979).

171. *Zappone*, 349 Md. at 64 n.7, 706 A.2d at 1069 n.7.

172. See, e.g., *Travelers Indem. Co. v. Merling*, 326 Md. 329, 339-44, 605 A.2d 83, 88-90 (1992) (dealing with common law principles as well as statutory principles under the Insurance Code concerning the relationship between insurers and agents); *Twelve Knotts v. Fireman’s Fund Ins. Co.*, 87 Md. App. 88, 99-102, 589 A.2d 105, 111-12 (1991) (analyzing common law tort remedies that would also fall under the Unfair Trade Practice subtitle of the Insurance Code); see also *supra* notes 71-75 and accompanying text (discussing the facts of *Travelers Indemnity Co.* in more depth).

173. *Zappone*, 349 Md. at 63, 706 A.2d at 1070.

174. *Id.* at 63 n.7, 706 A.2d at 1069 n.7. *Department of Human Resources v. Wilson*, 286 Md. 639, 643-44, 409 A.2d 713, 716 (1979), was cited by the *Zappone* court because it had incorrectly stated: “[o]rdinarily, where a statutory administrative remedy is provided, it will be deemed exclusive.” *Id.* While the *Zappone* court did agree with *Wilson*’s ultimate holding, it did so because no recognized alternative remedy for the plaintiff’s claims existed. *Id.*

175. See *White*, 282 Md. at 650-51, 387 A.2d at 266 (holding that a common law action does not lie to recover taxes erroneously paid under a mistake of law and since the only remedy available is a special statutory remedy, “that remedy obviously must be followed”).

176. *Id.*

177. See generally 2 KENNETH CULP DAVIS & RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE § 14.1, at 277 (3d ed. 1994) (discussing how courts cannot give effect to a legislature’s “overriding purpose of creating an agency with broad statutory responsibilities without requiring courts to relinquish some portion of their decisional autonomy in favor of the agency”).

When applying the above principle to the present case, the court quickly disposed of this issue, finding that the Insurance Code lacked language that would lead to the conclusion that the remedies provided under the Unfair Trade Practices subtitle were intended to be exclusive.¹⁷⁸ The court's conclusion that the language "in any way relieve' any person 'from any liability . . . under law'" supports non-exclusivity seems sufficient. The court, however, could have added additional support to its holding by examining the language of other sections of the Insurance Code. For example, because several other sections of the Insurance Code explicitly state that the applicable administrative remedy is exclusive, by implication, it can be said that if the legislature wanted the Unfair Trade Practices subtitle to be exclusive—it would have done so explicitly.¹⁷⁹

Second, the *Zappone* court validated the presumption that an administrative remedy is primary and must be exhausted before a claimant can pursue alternative remedies in the courts.¹⁸⁰ Prior case law using the word "exhaustion" in the primary jurisdiction doctrine may have led to confusion.¹⁸¹ The courts have normally interpreted the administrative remedy to be first invoked and followed before pursu-

178. *Zappone*, 349 Md. at 66-67, 706 A.2d at 1071.

179. See, e.g., MD. ANN. CODE art. 48A, § 25(4) (1994) (recodified as MD. CODE ANN., INS. § 2-202(a) (1997)) ("[T]he Commissioner has exclusive jurisdiction to enforce by administrative action the laws of the State that relate to the underwriting or rate-setting practices of an insurer."); *id.* § 6-412 (recodified as MD. CODE ANN., INS. § 8-420 (1997)) ("[T]he right of indemnification and reimbursement under this subsection shall not be exclusive of other rights to which an individual may be entitled as a matter of law."); *id.* § 133(c) (recodified as MD. CODE ANN., INS. § 9-204 (1997)) ("[A] delinquency proceeding is the exclusive method of liquidating, rehabilitating, reorganizing, or conserving an insurer.").

180. *Zappone*, 349 Md. at 67, 706 A.2d at 1071; see *Maryland Reclamation Assoc., Inc. v. Harford County*, 342 Md. 476, 493, 677 A.2d 567, 576 (1996) (finding that the court's have "'ordinarily construed the pertinent [legislative] enactments to require that administrative remedy be first invoked and followed' before resort to the courts" (quoting *Board of Educ. v. Hubbard*, 305 Md. 774, 786, 506 A.2d 625, 631 (1986))); *Clinton v. Board of Educ.*, 315 Md. 666, 678, 556 A.2d 273, 279 (1989) (determining that "[o]rdinarily, when there are two forums available, one judicial and the other administrative, . . . and no statutory directive indicating which should be pursued first, a party is often first required to run the administrative remedial course before seeking a judicial solution"); *Hubbard*, 305 Md. at 786, 506 A.2d at 631 (recognizing that the courts have ordinarily required that the administrative remedy be first invoked and followed).

181. In *Bits 'N' Bytes Computer Supplies, Inc. v. Chesapeake & Potomac Telephone Co.*, 97 Md. App. 557, 572, 631 A.2d 485, 493-94 (1993), the court realized that the parties' confusion of the issue of the exhaustion of administrative remedies doctrine was possibly due to the "loose language of some appellate opinions." See, e.g., *Department of Human Resources v. Wilson*, 286 Md. 639, 647, 409 A.2d 713, 718 (1979) (stating that "[t]he claimants failed to exhaust the effective, available [administrative] remedy . . . before seeking declaratory relief from the trial court").

ing judicial remedies.¹⁸² For example, in *Maryland House of Correction v. Fields*, the court found that when an administrative remedy is deemed primary, the administrative remedy must be pursued and exhausted before resort to the courts.¹⁸³ The use of the word “exhausted” could be misinterpreted as the court’s use of the “exhaustion of administrative remedies doctrine” which says that an administrative remedy that falls under the doctrine is deemed exclusive.¹⁸⁴ Thus, there is no independent civil court action after an administrative ruling, only limited judicial review of the ruling.¹⁸⁵ However, under the primary jurisdiction doctrine, an independent civil action is available along with a judicial review of the administrative decision.¹⁸⁶ This may have incorrectly led the courts to use the words “exclusive” when it actually meant “primary” in past opinions.¹⁸⁷ The above presupposition alleviates this possible misconception by stating that “there is no presumption that the administrative remedy was intended to be exclusive.”¹⁸⁸

182. See *Clinton*, 315 Md. at 678, 556 A.2d at 279 (“[O]rdinarily, when there are two forums available, one judicial and the other administrative, each able to afford essentially the same remedy, and no statutory directive indicating which should be pursued first, a party is often first required to run the administrative remedial course before seeking a judicial solution.”).

183. 348 Md. 245, 258, 703 A.2d 167, 174 (1997) (citing *Hubbard*, 305 Md. at 786, 506 A.2d at 631).

184. See *Bits 'N' Bytes*, 97 Md. App. at 572, 179 A.2d at 493-94 (“The parties confusion on [the exhaustion doctrine] may stem from the term ‘exhaustion’ itself which perhaps implies, incorrectly, that independent judicial action always can be pursued after an administrative remedy is exhausted. This confusion is also evident in loose language in some appellate opinions.”).

185. See *Maryland Comm’n on Human Relations v. Baltimore Gas & Elec. Co.*, 296 Md. 46, 51, 459 A.2d 205, 209 (1983) (generalizing that a party can resort to the courts only after there is a final order by the administrative agency); *Maryland-Nat’l Capital Park & Planning Comm’n v. Washington Nat’l Arena*, 282 Md. 588, 602, 386 A.2d 1216, 1226 (1978) (stating that the doctrine of exhaustion of administrative remedies allows only judicial review and arises in a situation when a claim is enforceable initially by administrative action exclusively); *Bits 'N' Bytes*, 97 Md. App. at 572, 631 A.2d at 493 (“[T]he doctrine of exhaustion of administrative remedies ‘demands that a party fully pursue administrative procedures before obtaining limited judicial review [of the administrative decision].’”); see also *White v. Prince George’s County*, 282 Md. 641, 649, 387 A.2d 260, 265 (1978) (asserting that when an administrative remedy is exclusive, one must normally exhaust the remedy before proceeding to the court for judicial review).

186. See *Bits 'N' Bytes*, 97 Md. App. at 573-74, 631 A.2d at 494 (noting that the primary jurisdiction doctrine applies when a court and administrative agency have concurrent jurisdiction over a matter and there is no statutory provision to coordinate work between the court and the agency).

187. *Zappone*, 349 Md. at 63 n.7, 706 A.2d at 1069 n.7 (“Sometimes opinions . . . seem to use the word ‘exclusive’ when the court actually means ‘primary.’”); see *supra* note 174 and accompanying text (describing a case that confused this issue).

188. *Zappone*, 349 Md. at 63, 706 A.2d at 1069.

Although not mentioned in the opinion, the court impliedly recognized that the presumption that an administrative remedy is intended to have primary jurisdiction to alternative judicial remedies has several valid functions. The proposition acknowledges that public agencies should normally have the initial opportunity to settle disputes that affect them. First, courts realize that there are occasionally situations that require the need for an agency's specialized expertise in resolving an issue and a higher quality decision will thus result because of this specialized knowledge.¹⁸⁹ This gives a reviewing court the benefit of an agency's findings that are within the agency's expertise.¹⁹⁰

Allowing resolution outside the court system is another function that promotes judicial economy and efficiency.¹⁹¹ Agencies are also usually the best equipped to promote uniformity and consistency in the regulation of business.¹⁹² The uniformity and consistency of an agency's decision would be frustrated if many different courts pos-

189. See RICHARD J. PIERCE, JR. ET AL., *ADMINISTRATIVE LAW AND PROCESS* 206 (1985) (noting that one consideration when deciding to invoke the primary jurisdiction doctrine is "the extent to which the agency's specialized expertise makes it a preferable forum for resolving the issue"); see KENNETH F. WARREN, *ADMINISTRATIVE LAW IN THE AMERICAN POLITICAL SYSTEM* 385-86 (1982) (opining that administrative agencies should be vested with the discretion to determine disputes that affect them). In *United States v. Western Pacific Railroad Co.*, 352 U.S. 59, 60-61 (1956), the government refused to pay established rate for "incendiary bombs" when it shipped napalm in steel casings. *Id.* The Army claimed that the lower rate for "gasoline in steel drums" applied and thus were eligible for the lower tariff rate applicable to gasoline. *Id.* at 61. The Supreme Court found that the doctrine of primary jurisdiction applied and referred the issue to the Interstate Commerce Commission. *Id.* at 63. The Court reasoned that because the agency had approved the rates for "incendiary bombs" and "gasoline" shipments, the agency had a specialized knowledge of the factors that caused it to draw the distinctions reflected in the tariff. *Id.* at 65-67.

190. Leonard E. Cohen, *Some Aspects of Maryland Administrative Law*, 24 MD. L. REV. 1, 24-25 (1964) (discussing the rationale behind the doctrine of primary jurisdiction).

191. See *Craig Lyle Ltd. Partnership v. Land O'Lakes, Inc.*, 877 F. Supp. 476, 483 (D. Minn. 1995) (announcing that the doctrine of primary jurisdiction has several functions, one of which is the promotion of judicial economy and efficiency by allowing resolution outside the court system).

192. In *Far East Conference v. United States*, 342 U.S. 570, 574-75 (1952), the Supreme Court held that uniformity and consistency in the regulation of business conferred to an agency is secured by the expertise of the agency. The Court went further to say that "the limited functions of review by the judiciary is more rationally exercised, by preliminary resort to ascertain and interpret the circumstances and underlying legal issues to agencies that are better equipped than courts by specialization, by insight gained through experience, and by more flexible procedure." *Id.* at 575; see also PIERCE ET AL., *supra* note 189, at 206 (noting that one consideration when deciding to invoke the primary jurisdiction doctrine is "the need for uniform resolution of the issue"); WARREN, *supra* note 189, at 385 ("Agencies are best equipped to promote unified regulatory policies through informed opinion and flexible procedures.").

sessed the ability to determine an issue.¹⁹³ Furthermore, the legislature creates an agency for the purpose of applying a statutory scheme to particular factual situations.¹⁹⁴ The primary jurisdiction doctrine permits the agency to carry out this function by giving an agency initial jurisdiction over an issue.

The court explained that when the primary jurisdiction doctrine is invoked, a claimant cannot maintain an alternative judicial action without first exhausting all administrative remedies.¹⁹⁵ By requiring a party to fully exhaust all administrative procedures before resort to the courts, as part of the primary jurisdiction presumption, the *Zappone* court recognized several additional benefits. As an initial matter, it is more efficient to avoid premature interruption of the administrative process.¹⁹⁶ This allows the results of the administrative process to be judicially reviewed at the conclusion rather than to permit the parties to seek judicial intervention at various intermediate stages.¹⁹⁷ Also, as agencies are not part of the judicial branch of government, requiring exhaustion protects an administration's autonomy.¹⁹⁸ Courts should not interfere with an agency's determinations until it has completed its action, or has clearly exceeded its jurisdiction.¹⁹⁹ An agency will also be given the opportunity to discover and correct its own mistakes through its own appellate process.²⁰⁰ If a claimant is required to fully pursue and exhaust all administrative remedies,

193. See *Texas & Pac. R.R. v. Abilene Cotton Oil Co.*, 204 U.S. 426, 440 (1907) (noting that railroad rates fall under the Interstate Commerce Commission because of the Act's objective to achieve national uniformity of railroad shipment rates, and this goal would be frustrated if numerous courts across the country could enforce ad hoc judgments of the reasonableness of such rates).

194. See *Far East Conference*, 342 U.S. at 574 ("[A]gencies created by Congress for regulating the subject matter should not be passed over.").

195. *Zappone*, 349 Md. at 63, 706 A.2d at 1069.

196. *McKart v. United States*, 395 U.S. 185, 193 (1969) (finding that the primary purpose of exhaustion is to avoid the premature interruption of the administrative process); *Soley v. State Comm'n on Human Relations*, 277 Md. 521, 526, 356 A.2d 254, 257 (1976) (permitting interruptions of the administrative process at various stages may undermine the purpose of the administrative agency). See generally 2 DAVIS & PIERCE, *supra* note 177, § 15.2, at 309 (discussing reasons for the exhaustion).

197. *McKart*, 395 U.S. at 194; *Soley*, 277 Md. at 527, 356 A.2d at 257. The *McKart* Court reasoned that an "agency, like a trial court, is created for the purpose of applying a statute in the first instance. Accordingly, it is normally desirable to let the agency develop the necessary factual background upon which decisions should be based." *McKart*, 395 U.S. at 193-94. The Court further stated that "since agency decisions are frequently of a discretionary nature or frequently require expertise, the agency should be given the first chance to exercise that discretion or to apply that expertise." *Id.* at 194.

198. *McKart*, 395 U.S. at 194; see *supra* note 196 and accompanying text (noting that exhaustion avoids premature interruption of the administrative process).

199. *McKart*, 395 U.S. at 194.

200. *Id.* at 195.

courts may never have to intervene.²⁰¹ Finally, the “frequent and deliberate flouting of administrative processes could weaken the effectiveness of an agency by encouraging people to ignore its procedures.”²⁰²

The *Zappone* court also realized that the primary jurisdiction presumption is not an inflexible doctrine, but rather a practical one that is rebuttable via the consideration of other factors. One such factor is whether there are any indications of legislative intent reflected in the statutory language or framework, or the statute’s legislative history.²⁰³ The legislature often describes the scope of an agency’s power in broad and ambiguous language.²⁰⁴ Thus, to determine whether there is any language in the statute that will guide a court in ascertaining legislative intent, a court needs to examine not only the plain meaning of the statute, but also relationships among the conduct at issue, the effects of that conduct, and the agency’s responsibilities under the statute.²⁰⁵

Using the same language that it used to determine that the statute was not exclusive, the *Zappone* court determined that this language in the Insurance Code “certainly suggests that the administrative language is not primary.”²⁰⁶ While the language of “‘in any way relieve’ any person ‘from any other liability . . . under law’” can easily be interpreted as not being exclusive and allowing other remedies (i.e., judicial remedies), the plain meaning of the statute does not say that the remedy is not primary or that it is clearly concurrent. Accordingly, the court should have invoked the presumption that the administrative remedy is intended to be primary when there are alternative judicial remedies.²⁰⁷ No remedies are taken away from a claimant when the primary jurisdiction doctrine is invoked; they are only delayed until all administrative remedies are exhausted. The *Zappone* court should have then continued its analysis with the assumption that the administrative remedy is primary until rebutted by any of the other following factors.

Comprehensiveness of the remedial scheme is a factor for the court to consider in determining the application of the presump-

201. *Id.*; *Soley*, 277 Md. at 526, 356 A.2d at 257.

202. *McKart*, 395 U.S. at 195.

203. *Zappone*, 349 Md. at 64, 706 A.2d at 1069.

204. See 2 DAVIS & PIERCE, *supra* note 177, § 14.2, at 281 (analyzing how to determine the scope of an agency’s jurisdiction from statutory language).

205. *Id.*

206. *Zappone*, 349 Md. at 68, 706 A.2d at 1071.

207. *Id.* at 63, 706 A.2d at 1069.

tion.²⁰⁸ The more comprehensive the administrative remedies, the more likely the legislature intended the administrative scheme to be primary.²⁰⁹ The rationale is that the legislature would not have provided an elaborate administrative framework if it did not want it to be implemented. The purpose of the agency would not be served if claimants were not required to bring their claims to the regulatory authority empowered to enforce the act. Furthermore, as stated in *Department of Human Resources v. Wilson*,²¹⁰ a comprehensive remedial scheme “establishes, as public policy,” that mandatory resort to an agency “produces the most efficient and effective result” of the intent of the legislature.²¹¹

Although the *Zappone* court stated that the Unfair Trade Practices subtitle of the Insurance Code was “somewhat comprehensive,” it illogically found that the subtitle was not comprehensive enough to lend support for the invocation of the primary jurisdiction doctrine.²¹² This holding is contrary to prior case law, that held similarly elaborate statutory schemes sufficient to invoke the primary jurisdiction doctrine.²¹³ For instance, in *Luskin’s, Inc. v. Consumer Protection Division*,²¹⁴ the Court of Appeals found that the Consumer Protection Division (CPD) had primary jurisdiction in consumer protection matters.²¹⁵ Reasoning that the numerous provisions of the Consumer Protection Act gave the CPD the ability to receive complaints, initiate investigations, issue cease and desist orders, and to exercise “any other function, power, and duty appropriate to protect and promote the welfare of consumers,” the court held that the CPD must have concurrent jurisdiction with the courts and that this is “precisely the situation

208. *Id.* at 64, 706 A.2d at 1070.

209. *Id.*

210. 286 Md. 639, 409 A.2d 713 (1979).

211. *Id.* at 645, 409 A.2d at 717.

212. *Zappone*, 349 Md. at 67, 706 A.2d at 1071.

213. The court cited several cases when it announced the proposition that a comprehensive remedial scheme is evidence that the legislature intended the administrative remedy to have primary jurisdiction over a particular matter. *Id.* at 64-65, 706 A.2d at 1070. The court compared *Luskin’s, Inc. v. Consumer Protection Division*, 338 Md. 188, 196, 657 A.2d 788, 792 (1995) (“[T]he [consumer protection division’s] jurisdiction is clearly evidenced by numerous provisions of the Consumer Protection Act.”) and *Board of Education v. Hubbard*, 305 Md. 774, 787-92, 506 A.2d 625, 631-34 (1986) (noting the State Board of Education’s broad authority to interpret the provisions of the Education Article and to decide disputes arising under the article) with *Maryland-National Capital Park & Planning Commission v. Crawford*, 307 Md. 1, 25-26, 511 A.2d 1079, 1091-92 (1986) (noting that the primary jurisdiction rule did not apply due to the non-exclusive nature of the Human Relations Committee’s jurisdiction).

214. 338 Md. 188, 657 A.2d 788 (1995).

215. *Id.* at 197, 657 A.2d at 792.

for which the primary jurisdiction doctrine was created to coordinate.”²¹⁶

Sections of the Unfair Trade Practice subtitle give the Insurance Commissioner the same general ability as the CPD has in the area of consumer protection, such as regulating unfair and deceptive acts under the Insurance Code.²¹⁷ Yet, the *Zappone* court failed to draw an analogy between *Luskin* and *Zappone* to find primary jurisdiction or at least support for the doctrine.²¹⁸

Moreover, *Moats v. City of Hagerstown* found that the Law Enforcement Officers' Bill of Rights was comprehensive because it comprised twenty pages in the Maryland Annotated Code.²¹⁹ In contrast, *Maryland-National Capital Park & Planning v. Crawford*²²⁰ found that five relatively brief sections dealing with employment discrimination was not comprehensive.²²¹ The Unfair Trade Practices subtitle consists of fifty-plus pages and over thirty-five sections. Despite this, the *Zappone* court held the subtitle was not comprehensive enough to lend support to the invocation of the primary jurisdiction doctrine.

Also troubling is the *Zappone* court's dismissal of the Court of Special Appeals's statement that the Insurance Code is comprehensive.²²² Rather, the *Zappone* court asserted no case had ever viewed the Insurance Code as sufficiently all-encompassing as to require the invocation of the primary jurisdiction doctrine.²²³ The court characterized *Equitable Life Assurance Society of the United States v. Maryland Commission on Human Relations*²²⁴ as standing for the proposition that the regulatory provisions of the Insurance Code are not so extensive as to indicate a

216. *Id.* at 196-97, 657 A.2d at 792.

217. *See supra* notes 39-51 and accompanying text (describing sections of the Unfair Trade Practices subtitle of the Maryland Code).

218. The appellees in *Zappone* did contend that because “an aggrieved claimant may file a complaint with the Insurance Commissioner, request an investigation and a hearing on the complaint with the Insurance Commissioner, and if dissatisfied with the Commissioner's resolution of the matter, obtain judicial review in the circuit court,” any administrative remedy under the Unfair Trade Practices subtitle must be exclusive by implication. *Zappone*, 349 Md. at 59, 706 A.2d at 1067.

219. 324 Md. 519, 524, 597 A.2d 972, 974 (1991).

220. 307 Md. 1, 511 A.2d 1079 (1986).

221. *Id.* at 26, 511 A.2d at 1092.

222. *See* *Magan v. Medical Mut. Liab. Ins. Soc'y*, 81 Md. App. 301, 307, 567 A.2d 503, 506 (1989). The court stated that “[t]he Insurance Code provides a comprehensive administrative structure and establishes a uniform method of appeal for an individual aggrieved by an insurer's violation of the Maryland Insurance Code.” *Id.*

223. *Zappone*, 349 Md. at 67, 706 A.2d at 1071 (citing *Equitable Life Assurance Soc'y of the United States v. Maryland Comm'n on Human Relations*, 290 Md. 333, 430 A.2d 60 (1981)).

224. 290 Md. 333, 430 A.2d 60 (1981).

legislative intent that the Insurance Commissioner should have exclusive jurisdiction over discriminatory practices in the sale of insurance, but should have concurrent jurisdiction with the Commission on Human Relations (Commission).²²⁵ However, *Equitable Life* is distinguishable from the present case for two reasons. First, *Equitable Life* dealt with a jurisdiction question between two administrative agencies while *Zappone* considered the jurisdiction between an administrative agency and the judiciary. Second, and most important, the *Equitable Life* court never examined the extensiveness of the regulatory provisions to conclude concurrent jurisdiction, but concluded there was concurrent jurisdiction because of an interpretation of the statutory language of the relevant Article.²²⁶ After examining the statute, the court found that there was no language that would “exclude, exempt or preempt insurers from the concurrent jurisdiction of the Commission.”²²⁷

By giving judicial deference to the agency’s own interpretation of the law, the *Zappone* court explained an additional factor to help reduce potential jurisdictional conflicts between agencies and courts.²²⁸ An agency’s interpretation may be relied on by the court out of esteem and respect, and judicial efficiency for the specialized understanding of the agency. In addition, because the legislature has placed an agency in charge of the execution of a statute, the agency’s interpretation of that statute should be entitled weight.²²⁹ This is especially true when the legislature has not altered the administrative construction of the statute; thus, in the absence of action, there is implied approval of the administration’s interpretation.²³⁰

The *Zappone* court relied on the Insurance Commissioner’s interpretation to determine that the administrative remedies were concurrent with judicial remedies. While the court stated that it relied on the agency’s interpretation, it never discussed the weight a court is entitled to give to an agency’s interpretation of the statutes it enforces.²³¹ The court also noted the subtitle has remained substantially

225. *Zappone*, 349 Md. at 67, 706 A.2d at 1071.

226. *Equitable Life*, 290 Md. at 337-39, 430 A.2d at 63-64.

227. *Id.* at 338, 430 A.2d at 63. The court also found that the language was “plain and in need of no explanation.” *Id.*

228. *Zappone*, 349 Md. at 65, 706 A.2d at 1070.

229. *United States v. Clark*, 454 U.S. 555, 565 (1982); 2 DAVIS, *supra* note 85, § 29.16, at 399.

230. See 2 DAVIS, *supra* note 85, § 29.16, at 403 (citing *NLRB v. Hendricks County Rural Elec. Corp.*, 454 U.S. 170, 177 (1981)).

231. See *supra* note 100 and accompanying text (discussing the factors that should be analyzed in determining how much weight should be given to an agency’s interpretation of the statutes it enforces).

unchanged for forty years²³² and cited the commissioner's well reasoned *amicus brief*²³³ in support of concurrent remedies. Thus, the case offers support for judicial deference to the commissioner's interpretation of the Unfair Trade Practices subtitle.

Lastly, the *Zappone* court emphasized the "nature of the alternative judicial cause of action pursued by the plaintiff."²³⁴ If the litigation does not depend on the "statutory scheme which also contains the administrative remedy" or the expertise of the administrative agency, there is no need for the administrative remedy to be deemed primary.²³⁵ If a person's claims are within the conventional competence of the courts, and the judgment of a technically expert body is not likely to be helpful, there is no need to resort to the expertise of an agency.²³⁶ A trial judge has the same expertise, if not more, to decide common law tort claims that are wholly independent of an administrative remedy.²³⁷ This highlights the discretionary application of these factors and alludes to the fact that a decision depends upon whether the court actually feels confident that it can answer the confronted question itself without resorting to the expertise of the available agency.

On a broader level, this competence factor may reveal the court's desire not to make a claimant suffer an unnecessary, complicated delay from the invocation and referral of an issue to an agency under the primary jurisdiction doctrine.²³⁸ This proposition validly recognizes that a litigant's interests in immediate judicial review may sometimes outweigh the government's interests in efficiency or administrative autonomy.²³⁹ This is especially true in a situation in which a competent court can resolve the matter more expeditiously and an agency can contribute only limited aid. In the case at hand, the court ultimately used this factor to conclude that the available administrative remedies were fully concurrent with any available judicial

232. *Zappone*, 349 Md. at 51, 706 A.2d 1063 ("The General Assembly has from time to time added some provisions to the 1947 statute. Nevertheless, the substance of the 1947 enactment has largely remained intact.").

233. *Id.* at 59 n.4, 706 A.2d at 1067 n.4; see *supra* note 160 and accompanying text (discussing the contents of the Insurance Commissioner's *amicus brief*).

234. *Zappone*, 349 Md. at 65, 706 A.2d at 1070.

235. *Id.* at 65-66, 706 A.2d at 1070.

236. *Nader v. Allegheny Airlines, Inc.*, 426 U.S. 290, 305-06 (1976).

237. *Zappone*, 349 Md. at 65-66, 706 A.2d at 1070.

238. 2 DAVIS & PIERCE, *supra* note 177, § 14.1, at 272-73; § 14.6, at 301.

239. See *West v. Bergland*, 611 F.2d 710, 718-20 (8th Cir. 1979) (discussing the need for balancing of governmental and individual interests when deciding if exhaustion of administrative remedies is required).

remedies. An insurance policy is a contract;²⁴⁰ there is no need to interpret any portion of the Insurance Code in order to adjudicate an action of fraud or negligence in purchasing that contract. The significant weight given this factor by the court in deciding that the court has concurrent jurisdiction with the Insurance Commissioner for insurance fraud by an insurer is understandable and is best stated by the Supreme Court in *Nader v. Allegany Airlines, Inc.*:²⁴¹

Referral of the misrepresentation issue to the [agency] cannot be justified by the interest in informing the court's ultimate decision with 'the expert and specialized knowledge' . . . of the [agency]. The action brought by petitioner does not turn on a determination of the reasonableness of a challenged practice—a determination that could be facilitated by an informed evaluation of the economics or technology of the regulated industry. The standards to be applied in action for fraudulent misrepresentation are within the conventional competence of the courts, and the judgment of a technically expert body is not likely to be helpful in the application of these standards to the facts of this case.²⁴²

5. *Conclusion.*—Through its decision in *Zappone*, the Court of Appeals has provided a procedural basis for determining whether an administrative remedy is exclusive, primary, or concurrent with alternative judicial remedies. *Zappone* dissolves ambiguities in prior case law and provides a clear framework so parties can determine whether a complaint should initially be raised before an agency or a court. This newly announced framework is a prescription for decreased litigation and increased certainty in the law.

While the new road map the court employed provides better guidance than in the past, the highly discretionary portion of the rebuttal of primary jurisdiction needs additional guidance. Especially trouble-

240. RESTATEMENT (SECOND) OF CONTRACTS § 55 cmt. a, illus. 2 (1981).

241. 426 U.S. 290 (1976); *see also* Maryland-Nat'l Capital Park & Planning Comm'n v. Washington Nat'l Arena, 282 Md. 588, 598-99, 386 A.2d 1216, 1224 (1978) (discussing judicial competence in the area of contract interpretation).

242. *Nader*, 426 U.S. at 305-06 (citation omitted). An argument could be made that because the purpose of the Insurance Commissioner would be circumvented if the primary jurisdiction doctrine was not invoked, a well regulated insurance industry may be harmed if alleged victims of deceptive acts or practices prohibited by the Unfair Trade Practices subtitle are not required to bring their claims before the regulatory authority empowered to enforce that subtitle. Furthermore, because a claimant may take his case to court, the Insurance Commissioner may never become aware of the alleged deceptive acts. While the claimant may receive monetary relief, the Insurance Commissioner's remedies of cease and desist orders, or loss of license may never be utilized to stop future tortious acts.

some is that the court does not assign any weight to three of the four factors.²⁴³ Ultimately, the weight given to these factors will most likely depend on which way the court wants to resolve the substantive question. As a result, although litigation overall will be reduced, any future litigation problems will most likely arise in the discretionary feature of the primary jurisdiction doctrine.

JASON W. BRIDGES

B. Finding that the Duty to Defend Precedes Notice, Maryland Holds the Liability Insurer Responsible for Pre-Notice Fees and Expenses

In *Sherwood Brands, Inc. v. Hartford Accident & Indemnity Co.*,²⁴⁴ the Court of Appeals reevaluated the scope of a liability insurer's duty to defend a claim against its insured, considering whether an insurer could be held accountable for the out-of-pocket expenditures that its insured paid prior to giving proper notice of the claim.²⁴⁵ In a unanimous decision, the court held that an insurer is liable for the reasonable costs and expenses that an insured incurs before notifying its insurer of a pending claim.²⁴⁶ Reasoning that the duty of an insurer to defend its insured exists as soon as there is a claim to defend,²⁴⁷ the

243. *Zappone*, 349 Md. at 64-66, 706 A.2d at 1069-70. The court never assigned weight to the comprehensiveness of the remedial scheme, the agency's interpretation of the statutes it is entitled to enforce, and the legislature's intent in the statutory language. The court, however, did say that the weight given to the nature of the alternative judicial cause of action is "extremely significant." *Id.* at 65, 706 A.2d at 1070.

244. 347 Md. 32, 698 A.2d 1078 (1997).

245. *Id.* at 35, 698 A.2d at 1079. The Court of Appeals granted certiorari "to consider the one question of whether [the insured] was entitled to reimbursement for reasonable litigation expenses incurred prior to [the date the insurer was notified of the claim]". In decisions preceding *Sherwood*, the Court of Special Appeals had consistently held that an insurer had no duty to defend until it received notice from the insured. *See, e.g.,* *Oweiss v. Erie Ins. Exch.*, 67 Md. App. 712, 718-19, 509 A.2d 711, 714-15 (1986) (holding that "the [insurer's] duty to defend did not arise until it was notified [of the amended declaration] and asked to assume the cost of defense" (citing *Brohawn v. Transamerica Ins. Co.*, 276 Md. 396, 407, 347 A.2d 842, 850 (1975); *Washington v. Federal Kemper Ins. Co.*, 60 Md. App. 288, 297, 482 A.2d 503, 507 (1984))); *Washington*, 60 Md. App. at 297, 482 A.2d at 507 (asserting that "[the insurer] had no duty to defend . . . until the assured requested a defense" (citing 14 GEORGE J. COUCH ET AL., COUCH ON INSURANCE § 51:35, at 444 (2d ed. rev. vol. 1982))). Accordingly, prior to *Sherwood*, a liability insurer was not liable for any litigation expenses that its insured incurred before the insured notified the insurance company.

246. *Sherwood*, 347 Md. at 50, 698 A.2d at 1087.

247. *Id.* at 44, 698 A.2d at 1083-84. The court stated:

[I]t would seem clear that the [insurer's] right to control the defense necessarily attaches as soon as there is something to defend . . . [and] [t]he the duty to defend, rationally, should attach at the same moment the correlative right to control attaches, *i.e.*, when the claim is made or . . . when an insured occurrence happens.

court extended section 482 of Article 48A of the Annotated Code of Maryland,²⁴⁸ now section 19-110 of the Insurance Article,²⁴⁹ to apply to pre-notice expenses.²⁵⁰ By so holding, the Court of Appeals eliminated the distinction between pre- and post-notice expenses, establishing that unless the insurer can prove the delay in notice caused actual prejudice, the delay is irrelevant to the insurer's obligations to pay for those litigation expenses that the policy holder incurred before giving notice of the occurrence of an insured event.

1. *The Case.*—On February 23, 1989, Hartford Accident and Indemnity Company (Hartford) issued a Comprehensive General Liability Insurance Policy to Sherwood Brands, Inc. (Sherwood), a North Carolina corporation that marketed and distributed food products.²⁵¹ Under the terms of the policy, Hartford agreed to pay “those sums that the insured becomes legally obligated to pay as damages because of . . . ‘advertising injury’ to which this insurance applies.”²⁵² Additionally, Hartford retained “the right and duty to defend any ‘suit’ seeking those damages” and the right to “investigate and settle any claim or ‘suit’ at [its] discretion.”²⁵³ The terms of the policy obligated Sherwood to notify Hartford “promptly of an ‘occurrence’ which may result in a claim,” and to provide “prompt written notice of the claim or suit.”²⁵⁴ Sherwood was also required to provide copies of all legal papers to Hartford, and to cooperate in any investigation, defense, or

Id.

248. MD. ANN. CODE art. 48A, § 482 (1979) (recodified as amended at MD. CODE ANN., INS. § 19-110 (1997)).

249. Section 19-110 of the Insurance Article reads:

An insurer may disclaim coverage on a liability insurance policy on the ground that the insured or a person claiming the benefits of the policy through the insured has breached the policy by failing to cooperate with the insurer or by not giving the insurer required notice only if the insurer establishes by a preponderance of the evidence that the lack of cooperation or notice has resulted in actual prejudice to the insurer.

MD. CODE ANN., INS. § 19-110. Although the current version of the statute is codified as section 19-110, this change was not effective until October 1, 1997, more than one month after the *Sherwood* decision. *Sherwood*, 347 Md. at 40, 698 A.2d at 1082. Thus, the Court of Appeals in *Sherwood*, as well as prior Maryland decisions, refers to the statute as section 482. *Id.*; see, e.g., *T.H.E. Ins. Co. v. P.T.P., Inc.*, 331 Md. 406, 414-15, 628 A.2d 223, 227 (1993). To avoid confusion, the statute will hereinafter be referred to as section 482.

250. *Sherwood*, 347 Md. at 49, 698 A.2d at 1086 (rejecting the insurance company's contention that the statute “has no application to pre-notice expenses”).

251. *Id.* at 35-36, 698 A.2d at 1079-80.

252. *Id.* at 36, 698 A.2d at 1080 (omission in original) (internal quotation marks omitted).

253. *Id.* (internal quotation marks omitted).

254. *Id.* (internal quotation marks omitted).

settlement.²⁵⁵ Under the terms of the policy, any payment Sherwood made for its own defense, without Hartford's consent, was to be at its own cost.²⁵⁶

Between January and August 1989, one of Sherwood's competitors in the food industry, Osem Food Industries, filed several complaints alleging unfair and deceptive trade practices against Sherwood.²⁵⁷ Sherwood failed to immediately notify Hartford of each complaint.²⁵⁸ Although the last amended complaint was filed on August 14, 1989, Sherwood did not notify Hartford of the lawsuit or provide the insurance company with copies of the court papers until June 18, 1991.²⁵⁹ This notice arrived two-and-a-half years after Osem filed its original lawsuit, and one year and ten months after Osem filed its last amended complaint.²⁶⁰

Hartford denied coverage on September 18, 1991, on the sole ground that Osem's suit rested on allegations that occurred before the inception of Sherwood's policy.²⁶¹ Hartford did not assert that it

255. *Id.* at 37, 698 A.2d at 1080.

256. *Id.*

257. *Id.* at 35-38, 698 A.2d at 1079-80. Osem first filed suit against Sherwood on January 6, 1989 in the United States District Court for the Middle District of North Carolina. *Id.* at 35, 698 A.2d at 1079. Osem's claim alleged that Sherwood had been using soup mix packaging that was confusingly similar to the package used by Osem, and Sherwood consented to a court order enjoining it from the use of the objectionable packaging. *Id.* at 35-36, 698 A.2d at 1079. The order was issued on January 31, 1989, nearly one month before Hartford issued the insurance policy to Sherwood on February 23, 1989. *Id.* at 36, 698 A.2d at 1079-80. On February 27, 1989, Osem supplemented its complaint against Sherwood, adding claims based on Sherwood's continued use of packaging "virtually identical and confusingly similar" to Osem's packaging. *Id.* at 37, 698 A.2d at 1080. According to Osem, although Sherwood had made some changes in the challenged packaging, they were insufficient to satisfy the court-ordered injunction. *Id.* Finally, on August 14, 1989, Osem filed an amended complaint against Sherwood. *Id.* at 37-38, 698 A.2d at 1080. In addition to incorporating the January 6 complaint and the February 27 supplement, Osem made new claims of defamation, unfair competition, and deceptive trade practices. *Id.* Specifically, Osem alleged that "Sherwood disseminated to an Osem customer false and misleading statements concerning Osem and its products." *Id.* at 38, 698 A.2d at 1080.

258. *Id.* at 37-38, 698 A.2d at 1080-81. Sherwood also failed to notify Hartford of Osem's original January 6, 1989 complaint when it applied to Hartford for liability insurance. *Id.* at 39, 698 A.2d at 1081.

259. *Id.* at 38, 698 A.2d at 1080-81. Sherwood did not consider the prospect of notifying Hartford until May 1991 when it retained a new attorney. *Id.* It was this new attorney who suggested that Sherwood notify Hartford of the pending suit, a possibility that Sherwood had not previously considered. *Id.* According to Sherwood, it simply did not realize that Osem's claim might be covered by the Hartford policy. *Id.*

260. *Id.* at 35-38, 698 A.2d at 1079-81. Osem's original complaint was filed on January 6, 1989. *Id.* at 35, 698 A.2d at 1079. It was supplemented on February 27, 1989, and amended for the last time on August 14, 1989. *Id.* at 37, 698 A.2d at 1080. Sherwood notified Hartford on June 18, 1991. *Id.* at 38, 698 A.2d at 1081.

261. *Id.* at 38, 698 A.2d at 1081.

denied coverage because of Sherwood's delayed notice.²⁶² Following the denial of coverage, Sherwood continued to defend the lawsuit and, eventually, on November 30, 1992, settled with Osem for \$100,000.²⁶³

On June 25, 1993, Sherwood filed a breach of contract claim against Hartford.²⁶⁴ Sherwood sought (1) a declaratory judgment that Hartford had a duty to defend and indemnify Sherwood under the policy, (2) a judgment that Hartford had breached its contract by failing to do so, and (3) damages for the breach.²⁶⁵ In its defense, Hartford primarily argued that Osem's claims arose prior to the inception of Sherwood's policy.²⁶⁶ Additionally, Hartford contended that no coverage existed because Osem's claim did not constitute "advertising injury" as defined in the policy,²⁶⁷ and that by not informing Hartford of Osem's claims when Sherwood applied for the coverage, Sherwood had made a material misrepresentation.²⁶⁸

The Circuit Court for Montgomery County denied Hartford's motion to dismiss and granted Sherwood's motion for partial summary judgment, reasoning that the allegations presented in Osem's February 1989 supplement to its complaint regarding Sherwood's new packaging arose after the insurance policy took effect.²⁶⁹ The court held that, as a matter of law, Hartford had a duty to defend Sherwood in the Osem lawsuit.²⁷⁰ At a separate hearing, Judge William P. Turner held that "Hartford had a duty to indemnify Sherwood and to pay

262. *Id.* Although Hartford noted in a previous communication with Sherwood that the notice of Osem's lawsuit was significantly delayed and asserted the possibility of prejudice from this delayed notice, Hartford did not deny coverage on these grounds. *Id.* Instead, in its September 18, 1991 letter to Sherwood, it relied entirely on its conclusion that "all of the allegations occurred prior to the inception date of the Hartford policy." *Id.*

263. *Id.* at 39, 698 A.2d at 1081.

264. *Id.*; *Hartford Acc. & Indem. Co. v. Sherwood Brands, Inc.*, 111 Md. App. 94, 99, 680 A.2d 554, 556 (1996) (indicating that Sherwood requested a declaratory judgment against the insurance company and "alleged that Hartford had wrongfully refused to provide a defense for Sherwood when it was sued by Osem"), *vacated*, 347 Md. 32, 698 A.2d 1978 (1997).

265. *Sherwood*, 347 Md. at 39, 698 A.2d at 1081.

266. *Id.*

267. *Id.* The policy defined the term "advertising injury" to include "the misappropriation of advertising ideas or style of doing business." *Id.* at 36, 698 A.2d at 1080.

268. *Id.* at 39, 698 A.2d at 1081.

269. *Id.* (noting that the circuit court reasoned that "at a minimum, the allegations relating to the 'red package' set forth in the February 27 supplement arose after the policy was issued").

270. *Id.*; *Hartford Acc. & Indem. Co. v. Sherwood Brands, Inc.*, 111 Md. App. 94, 99, 680 A.2d 554, 557 (1996) (noting the trial court "held that Hartford, as a matter of law, had a duty to defend Sherwood under the terms of the [insurance] policy"), *vacated*, 347 Md. 32, 698 A.2d 1978 (1997).

legal costs incurred by Sherwood in defense of the Osem litigation."²⁷¹ On the issue of damages, the jury found that Sherwood's defense costs and the settlement amount were reasonable, and the court entered judgment against Hartford in the amount of \$497,366.²⁷² This amount included the pre-notice expenses incurred by Sherwood.²⁷³ Hartford then appealed to the Court of Special Appeals.²⁷⁴

Hartford argued on appeal that it was not liable for any costs incurred by Sherwood before it gave the requisite notice.²⁷⁵ Sherwood countered that under section 482 of article 48A of the Maryland Code, "an insured is entitled to pre-notice defense costs and expenses when the insurer has not demonstrated actual prejudice as a result of the delay in receiving notice."²⁷⁶ The Court of Special Appeals agreed with Hartford, holding that the insurance company did not become obligated to provide a defense for Sherwood until the company received notice on June 18, 1991, and could therefore not be liable for the expenses Sherwood incurred before that time.²⁷⁷ The court further held that "section 482 applies only when it is claimed that the insured has breached a condition," and not when coverage is denied based on the scope of coverage.²⁷⁸ The court reasoned that the policy did not permit Sherwood to recover out-of-pocket expenses without

271. *Sherwood*, 111 Md. App. at 99, 680 A.2d at 557.

272. *Sherwood*, 347 Md. at 39-40, 698 A.2d at 1081. The jury award was broken down as follows: a total of \$182,103.00 in reasonable fees paid to Sherwood's original two attorneys; \$102,688.00 in reasonable fees paid to the Sherwood attorney retained in May of 1991; \$100,000.00 paid in settlement to Osem; and an additional \$112,573.00 paid in litigation expenses and attorney's fees. *Id.*

273. *Id.*

274. *Sherwood*, 111 Md. App. at 100, 680 A.2d at 557. Sherwood also filed an appeal of the trial court's decision, arguing that the court erred in failing to award prejudgment interest on the damages. *Id.*

275. *Id.* Hartford also contended that the trial court was incorrect when it held that (1) Hartford had a duty to defend Sherwood, (2) Sherwood did not make a material misrepresentation in its application for coverage, (3) the two and one-half year delay in notice did not prejudice Hartford, and (4) Hartford was liable for the costs Sherwood incurred before the effective date of the insurance policy. *Id.* The Court of Special Appeals found that the trial judge was legally correct when it found Hartford had a duty to defend, that Sherwood did not make a material misrepresentation, and that Hartford was not prejudiced by the delay in notice. *Id.* at 107-13, 680 A.2d at 561-63. Following the trial court's decision, Sherwood agreed with Hartford that the insurance company was not liable for the payment of any fees and expenses incurred by Sherwood before the effective date of the policy. *Id.* at 120, 680 A.2d at 567.

276. *Id.* at 117, 680 A.2d at 565; see *infra* note 299 and accompanying text (quoting section 482).

277. *Sherwood*, 111 Md. App. at 116, 680 A.2d at 564-65.

278. *Id.* at 119, 680 A.2d at 566.

Hartford's consent.²⁷⁹ Accordingly, the Court of Special Appeals vacated the circuit court's decision, thereby releasing Hartford's liability for Sherwood's pre-notice litigation costs.²⁸⁰ Sherwood then filed a petition with the Court of Appeals, which granted certiorari²⁸¹ to consider the sole issue of whether Hartford was liable for the reasonable expenses Sherwood incurred prior to the date of notice.²⁸²

2. *Legal Background.*—

a. The Notice Requirement as a Condition Precedent to Insurance Coverage.—Prior to 1964, Maryland courts required that the language of an insurance contract, including the notice requirement, be read literally.²⁸³ Consequently, the Court of Appeals construed the insured's obligation to provide prompt notice as a condition precedent to coverage.²⁸⁴ Allowing the insurance company to dictate the terms of the insurance policy, the court consistently held that the plain meaning of the policy's language must, as in any other type of contract, be read literally.²⁸⁵ Thus, the court gave considerable weight to

279. *Id.* at 116-17, 680 A.2d at 565 ("Insurance policy provisions forbidding the voluntary incurring of costs are routinely upheld . . . [and] [s]uch provisions have been construed to preclude the payment of pre-notice attorneys' fees by insurers." (citing *Lafarge Corp. v. Hartford Cas. Ins. Co.*, 61 F.3d 389, 400 (5th Cir. 1995); *Northern Ins. Co. v. Allied Mut. Ins. Co.*, 955 F.2d 1353, 1360 (9th Cir. 1992); *Gribaldo, Jacobs, Hones & Assocs. v. Agrippina Versicherungen A.G.*, 476 P.2d 406 (Cal. 1970))).

280. *Id.* at 116, 680 A.2d at 564-65.

281. *Sherwood Brands v. Hartford Acc. & Indem. Co.*, 344 Md. 116, 685 A.2d 450 (1996).

282. *Id.* Following the decision of the Court of Special Appeals, Sherwood and Hartford entered into an agreement settling all disputes except the issue of pre-notice expenses. *Sherwood*, 347 Md. at 35 n.1, 698 A.2d at 1079 n.1.

283. *See, e.g., Watson v. United States Fidelity & Guar. Co.*, 231 Md. 266, 271, 189 A.2d 625, 627 (1963) (applying the language of the insurance contract literally because "when the language employed in [an insurance contract] is unambiguous, such a policy is to be construed as other contracts"); *American Auto. Ins. Co. v. Fidelity & Cas. Co.*, 159 Md. 631, 636, 152 A.2d 523, 525 (1930) (noting that "it has been repeatedly held by this court that when the terms of a contract are clear and unambiguous, courts have no right to make new contracts for the parties").

284. *See, e.g., Watson*, 231 Md. at 271, 189 A.2d at 627 (interpreting the notice requirement as a "condition precedent to an action against the insurer"); *Lennon v. American Farmers Mut. Ins. Co.*, 208 Md. 424, 430, 118 A.2d 500, 503 (1955) (reasoning that the notice requirement is such an important provision to the insurance contract that "as a general rule, compliance by the insured with the requirement of notice is a condition precedent to the right of recovery"); *Employers' Liab. Assur. Corp. v. Perkins*, 169 Md. 269, 273, 181 A. 436, 438 (1935) (finding that the notice requirement is a condition "which cannot be waived or altered except by an indorsement").

285. *See, e.g., Watson*, 231 Md. at 271, 189 A.2d at 627 (reading the language literally because "when the language employed . . . is unambiguous, such a policy is to be construed as other contracts").

the insurer's interest in controlling any lawsuit, while ultimately providing very little protection to the insured.²⁸⁶

The Court of Appeals allowed the interests of the insurer to control the outcome in *Lennon v. American Farmers Mutual Insurance Co.*²⁸⁷ In *Lennon*, the insured was sued as a result of his involvement in a traffic accident.²⁸⁸ Although he requested that the insurance company defend the suit shortly after it was filed, the suit was not filed until nineteen months after the automobile accident.²⁸⁹ After stating that "[t]he purpose of the provision in an insurance policy that the insured shall give the insurer notice of an accident as soon as practicable is to give the insurer an opportunity to make an adequate investigation of the circumstances,"²⁹⁰ the court described the notice requirement as "an important provision for the insurer's protection, not only against fraudulent claims, but also against claims which are invalid although made in good faith."²⁹¹ Thus, the court justified the general rule requiring notice as a condition precedent to an insured's right to liability insurance coverage.²⁹²

Time and again, the Court of Appeals addressed the question whether "the insurer . . . [is] liable under its policy of insurance even though the assured failed to comply with a condition precedent of the policy requiring the giving of written notice of an accident as soon as practicable."²⁹³ In *Watson v. United States Fidelity & Guaranty Co.*,²⁹⁴ the court explicitly rejected the insured's argument that a better rule would be to require the insurance company to show that the delay in notice caused it actual prejudice before it could legally deny cover-

286. See, e.g., *Lennon*, 208 Md. at 430, 118 A.2d at 503 (emphasizing that strict adherence to the notice requirement is necessary for the insurer's protection).

287. 208 Md. 424, 118 A.2d 500 (1955) (explaining the importance of the notice requirement for the insurer). Other cases demonstrate the court's protectionist attitude toward the insurer. See, e.g., *Watson*, 231 Md. at 272, 189 A.2d at 627 (explicitly rejecting a proposed prejudice requirement that would have prevented the insurance company from denying coverage); *Perkins*, 169 Md. at 273, 181 A. at 438 (refusing to exempt the insured from the notice requirement when there was no endorsement from the insurance company).

288. *Lennon*, 208 Md. at 426, 118 A.2d at 501.

289. *Id.*

290. *Id.* at 430, 118 A.2d at 502.

291. *Id.*, 118 A.2d at 503.

292. *Id.* (citing *Lewis v. Commercial Cas. Ins. Co.*, 142 Md. 472, 480, 121 A. 259 (1923); *McCarthy v. Rendle*, 119 N.E. 188 (Mass. 1918)).

293. *Watson v. United States Fidelity & Guar. Co.*, 231 Md. 266, 269, 189 A.2d 625, 626 (1963); see also *American Auto. Ins. Co. v. Fidelity & Cas. Co.*, 159 Md. 631, 636, 152 A.2d 523, 525 (1930) (rejecting insured's contention that its failure to promptly notify the insurer might not relieve the insurer from liability).

294. 231 Md. 266, 189 A.2d 625 (1963).

age.²⁹⁵ Noting that the requirement of actual prejudice was “not in accord with the Maryland decisions,”²⁹⁶ the *Watson* court reaffirmed that notice must be given in strict accordance with the insurance policy in order to hold the insurer liable for coverage.²⁹⁷ Accordingly, whether the insurance provider suffered actual prejudice caused by delayed notice was irrelevant. This result engendered reaction from the Maryland General Assembly, which acted to rectify the pro-insurer judicial stance.

b. The Requirement of Actual Prejudice.—In 1964, the Maryland General Assembly initiated the first significant change in the insurer’s liability. In response to the *Watson* court’s rejection of the prejudice requirement, the Maryland General Assembly enacted section 482 of article 48A of the Maryland Code.²⁹⁸ The statute, effective June 1, 1964, states:

Where any insurer seeks to disclaim coverage on any policy of liability insurance issued by it, on the ground that the insured or anyone claiming the benefits of the policy through the insured has breached the policy by failing to cooperate with the insurer or by not giving requisite notice to the insurer, such disclaimer shall be effective only if the insurer establishes, by a preponderance of affirmative evidence that such lack of cooperation or notice has resulted in actual prejudice to the insurer.²⁹⁹

Thus, the liability of an insurer became enforceable after delayed notice as long as the insurer did not suffer actual prejudice as a result of

295. *Id.* at 272, 189 A.2d at 627 (rejecting the appellant’s contention that “even though the notice condition herein involved is a condition precedent, it is unavailable to the Company as a denial of liability under the policy, unless the Company was prejudiced by the failure to give prompt notice”).

296. *Id.*

297. *Id.* at 272-73, 189 A.2d at 628.

298. *See St. Paul Fire & Marine Ins. Co. v. House*, 315 Md. 328, 332, 554 A.2d 404, 406 (1989) (recognizing that section 482 was enacted to address the *Watson* decision); *Washington v. Federal Kemper Ins. Co.*, 60 Md. App. 288, 293, 482 A.2d 503, 505 (1984) (same). The Maryland General Assembly acted out of concern for the lack of protection the courts had given those covered by liability insurance. *See T.H.E. Ins. Co. v. P.T.P. Inc.*, 331 Md. 406, 422-23, 628 A.2d 223, 230-31 (1993) (Eldridge, J., dissenting) (stating that by enacting section 482, the General Assembly “sought to protect consumers of liability insurance . . . by providing that an insurance company may not disclaim coverage under *any* liability insurance policy on the ground that the insured failed to give ‘requisite notice to the insurer’ unless the insurer established that the failure resulted in actual prejudice”).

299. Act of April 7, 1964, ch. 185, 1964 Md. Laws 445, 446, *repealed and re-enacted by* Act of April 29, 1966, ch. 205, 1966 Md. Laws 445 (codified as amended at Md. CODE ANN., INS. § 19-110 (1997)).

that delay.³⁰⁰ Following the enactment of section 482, the Maryland courts acknowledged that the notice requirement was no longer a condition precedent to the insurer's liability, but refused to extend the duty to defend to apply before notice was given.³⁰¹ Because the courts applied section 482 only to the post-notice costs of the litigation, actual prejudice was required to alleviate the insurer's duty to defend a lawsuit after it received notice, but the insured could never recover any pre-notice legal expenses.³⁰² This pro-insurer position embraced by the Maryland courts was consistent with the former judicial requirement that notice be a condition precedent to insurance coverage.³⁰³

Over the next thirty years, the Maryland courts diligently applied this interpretation of section 482 to insurers' liability. In *Washington v. Federal Kemper Insurance Co.*,³⁰⁴ the Court of Special Appeals noted that the notice requirement was no longer a condition precedent to insur-

300. See *House*, 315 Md. at 332, 554 A.2d at 406 (noting that section 482 made policy provisions requiring notice to an insurer "covenants and not conditions" and that the statute measures "by the standard of actual prejudice the materiality of any breach of those covenants by the insured for the purpose of determining if the breach excuses performance by the insurer"); see also *infra* note 299 and accompanying text (quoting section 482).

301. See *Scottsdale Ins. Co. v. American Empire Surplus Lines Ins. Co.*, 791 F. Supp. 1079, 1082, 1084 (D. Md. 1992) (mem.) (noting that under Maryland law, "late notice to an insurer will not eliminate its obligations under a liability policy unless the insurer can prove that it has been prejudiced by the delay," but stating that "an insurer's obligation to defend is triggered only when the insured tenders to the insurer the defense of an action which is potentially within the policy" (citing *Oweiss v. Erie Ins. Exch.*, 67 Md. App. 712, 718-19, 509 A.2d 711, 714 (1986); *Washington*, 60 Md. App. at 288, 480 A.2d at 503)); *House*, 315 Md. at 332, 554 A.2d at 406 (asserting that section 482 "makes policy provisions requiring notice to . . . the insurer covenants and not conditions"); *Oweiss*, 67 Md. App. at 717, 509 A.2d at 714-15 (finding that the insurer's "duty to defend did not arise until it was notified . . . and asked to assume the costs of defense" (citing *Brohawn v. Transamerica Ins. Co.*, 276 Md. 396, 407, 347 A.2d 842, 850 (1975); *Washington*, 60 Md. App. at 297, 482 A.2d at 507)).

302. See *Hartford Acc. & Indem. Co. v. Sherwood Brands, Inc.*, 111 Md. App. 94, 116, 680 A.2d 554, 564-65 (1996) (holding that because the insurer has no duty to defend before it receives notice it "does not have an obligation to pay [the insured's] attorney's fees incurred before that date"), *vacated*, 347 Md. 32, 698 A.2d 1078 (1997); see, e.g., *Mount Vernon Fire Ins. Co. v. Scottsdale Ins. Co.*, 99 Md. App. 545, 564, 638 A.2d 1196, 1205 (1994) (holding the insurer "did not have any duty to defend . . . until it received notice" and therefore, the insured is only entitled to reimbursement for the reasonable and necessary expenses it incurred after the date of notice); *Oweiss*, 67 Md. App. at 719-20, 509 A.2d at 715 (finding that the insurer had a duty to assume the cost of defense, but only after receiving notice of a covered claim); *Washington*, 60 Md. App. at 297-98, 482 A.2d at 507-08 (finding that there was no duty to defend before notice was given and, because notice was given after judgment, insurer had no obligation to pay the cost of defense).

303. See *supra* note 284 for examples of the court's decisions prior to 1964.

304. 60 Md. App. 288, 482 A.2d 503 (1984).

ance coverage.³⁰⁵ In *Washington*, a dissatisfied customer sued an insured construction company.³⁰⁶ The construction company failed to give the requisite notice to its insurer, instead notifying it sixteen months after being served in the suit and shortly after an unfavorable verdict in the case.³⁰⁷ The court held that although the delay in notice did not automatically disqualify the insured from coverage, the insurance company had demonstrated that the delay caused actual prejudice sufficient to justify the insurer's denial.³⁰⁸ Additionally, the *Washington* court rejected the insured's claim that the insurance company still had a duty to pay the insured's counsel fees.³⁰⁹ Stating that "[the insurer] had no duty to defend . . . until the assured requested a defense," the court found that the insurer had no obligation to pay where the request was made after the case had been tried.³¹⁰

The court's reasoning in *Washington* was consistent with its other liability insurance decisions. Following the enactment of section 482, the Court of Special Appeals repeatedly held that although a delay in notice did not completely alleviate the insurer of its duty to defend a lawsuit, that duty could not arise until notice was given.³¹¹ Accordingly, insurance companies were never held accountable for pre-notice expenses, no matter how reasonable.³¹²

3. *The Court's Reasoning.*—In *Sherwood Brands, Inc. v. Hartford Accident & Indemnity Co.*, the Court of Appeals held that a liability in-

305. *Id.* at 293, 482 A.2d at 505 (stating that "[p]rior to 1964, the rule in Maryland was that an insurer was not liable to defend an insured unless there was compliance by the insured with the policy requirement of notice . . . [and] [c]ompliance with the policy provision was a condition precedent to the insurer's liability, whether or not the insurer was prejudiced," but that "the law in Maryland presently requires proof . . . that the insurer suffered actual prejudice").

306. *Id.* at 290, 482 A.2d at 504.

307. *Id.* at 291, 482 A.2d at 504.

308. *Id.* at 296, 482 A.2d at 507 (finding that "the mere entry of the adverse judgment is affirmative evidence of actual prejudice to the insurer").

309. *Id.* at 297, 482 A.2d at 507.

310. *Id.*, 482 A.2d at 507-08.

311. See *Mount Vernon Fire Ins. Co. v. Scottsdale Ins. Co.*, 99 Md. App. 545, 564, 638 A.2d 1196, 1205 (1994) (holding that the insurance company was not responsible for pre-notice attorney's fees because it "did not have any duty to defend [the insured] until it received notice"); *Oweiss v. Erie Ins. Exch.*, 67 Md. App. 712, 718-19, 509 A.2d 711, 714-15 (1986) (holding that the insurer's "duty to defend did not arise until it was notified . . . and asked to assume the cost of the defense").

312. See, e.g., *Scottsdale*, 99 Md. App. at 564, 638 A.2d at 1205 (holding that the insured "is entitled to reimbursement for the reasonable and necessary expenses it incurred after [the date of notice]"); *Oweiss*, 67 Md. App. at 719-20, 509 A.2d at 715 (concluding that the insurance company had a "duty to assume the [insured's] cost of [the] defense" upon notice of a covered claim).

surer may be responsible for litigation expenses incurred by the insured prior to receiving proper notice of the insured's claim, thereby expanding the scope of the insurer's obligation to pay for its insured's defense.³¹³ The court considered the following question:

whether, in light of [section 482 of article 48A of the Maryland Code], an insurer is liable for pre-notice fees and costs incurred in the defense of a lawsuit when (1) the insurer breaches its duty to defend after receiving delayed notice of the suit, (2) the insured's delay in giving notice is unintentional and in good faith, (3) the insurer is not prejudiced by the delay, and (4) the fees and costs are reasonable and would have been incurred by the insurer has timely notice been given.³¹⁴

The *Sherwood* court relied on three levels of reasoning to reach the conclusion that the insurer's duty to defend exists before it receives notice of a claim and, in so doing, accepted three fundamental propositions. First, the court concluded that the insurer's duty to defend a claim against its insured and its right to control the defense of that claim are "reciprocal or correlative provisions" of the insurance contract.³¹⁵ Second, the court reasoned that the right to control the defense must attach "as soon as there is something to defend."³¹⁶ Third, the court established new law by asserting that the duty to defend should apply at the same moment the insurer gains the right to control the defense without regard to the timing of notice.³¹⁷ Thus, the obligation of the insurance company to defend its insured attaches at the moment the insured becomes entitled to coverage.

Once the court established that the commencement of the insurer's duty to defend predated the receipt of notice, it addressed the breach of this duty.³¹⁸ The court concluded that, although the obligation to defend the insured arises before notice, an insurer does not breach this duty until it is notified of a claim and declines coverage

313. *Sherwood*, 347 Md. at 50, 698 A.2d at 1087.

314. *Id.* at 40, 698 A.2d at 1082.

315. *See id.* at 43, 698 A.2d at 1083 (reasoning that the "right to control the defense . . . is important to the insurer as a mechanism for protecting and minimizing its duty of indemnification [and] [i]f it is to be liable for any judgment rendered against the insured, it has a right to make certain that a proper defense is made").

316. *Id.* at 44, 698 A.2d at 1083 (reasoning that "it would hardly be sound to conclude that the right [to control the defense] does not *exist* or does not *arise* until notice is given, for if that were the case, the right to control vested in the insurer would effectively be within the control of the insured").

317. *Id.*, 698 A.2d at 1083-84.

318. *Id.* at 46, 698 A.2d at 1084.

without legal justification.³¹⁹ Clarifying the impact of the rule on the insurer's liability, the court noted that because the insurer is no longer exempt from the duty to defend before it receives notice, it is no longer reasonable to absolve the insurer of its pre-notice obligations.³²⁰

The court reasoned that when the duty to defend arises prior to notice, questions regarding pre-notice obligations depend on a "fact-specific inquiry and analysis" of the breach.³²¹ For this analysis, the court identified two factors that will control the insurer's liability: (1) whether the insurance company undertakes the defense upon notice, and (2) if it declines coverage and does not undertake the defense, whether the insurance company's grounds for the denial are legally valid.³²² The court concluded that where the insurance company honors its duty by defending its insured, there is no breach of contract.³²³ In such a case, however, the court reasoned that the insurer can still be responsible for the pre-notice expenses if the delay did not cause it actual prejudice within the meaning of section 482.³²⁴

Similarly, where the insurance company declines coverage based on the delay in notice, if it is unable to prove that the delay cause it actual prejudice, it will be liable for the entire cost of the defense, both post- and pre-notice.³²⁵ Finally, the court addressed the situation in *Sherwood*, where an insurance company declines to defend its insured on some basis other than delayed notice.³²⁶ The court first concluded that if Hartford's grounds for denying coverage had been valid, the insurer would have had no obligation to *Sherwood*.³²⁷ How-

319. *Id.*

320. *Id.* at 47-48, 698 A.2d at 1085.

321. *Id.* at 48, 698 A.2d at 1085.

322. *Id.* at 48-50, 698 A.2d at 1085-86. The court discussed three circumstances that would impact an insurance company's obligation to pay pre-notice expenses: (1) an insurance company may undertake the defense upon receiving delayed notice, (2) an insurer may decline coverage following delayed notice, asserting that the delay was a material breach; or (3) an insurer may decline coverage for a reason other than the delay. *Id.* at 48-49, 698 A.2d at 1085-86. In this case, the court dealt primarily with the third possibility; Hartford had denied coverage, but not on the grounds of delayed notice. *Id.* at 50, 698 A.2d at 1086.

323. *Id.* at 48, 698 A.2d at 1086.

324. *Id.* ("The relevant question as to pre-notice expenses . . . is whether the insurer has been prejudiced within the meaning of § 482 . . .").

325. *Id.* at 49-50, 698 A.2d at 1086 (concluding that an insurer who fails to prove that it was "prejudiced by the delayed notice. . . would be in no better position, with respect to pre-notice expenses, than the insurer who . . . undertakes the defense").

326. *Id.* at 50, 698 A.2d at 1086-87.

327. *Id.*, 698 A.2d at 1086 (asserting that "if the court ultimately agrees [that the claim is outside the policy coverage], there is no obligation to reimburse the insured for any litigation expenses, whether incurred before or after the notice was given").

ever, if the insurer had a duty to defend, which it breached by denying coverage, "the insurer is liable for all damages incurred by the insured as a result of [the] breach."³²⁸ Reiterating its conclusion that the insurer's duty to defend its insured "arises upon the happening of an insured event,"³²⁹ the court held that Hartford was liable for all expenses of the litigation, including those Sherwood incurred prior to its notice to the insurer.³³⁰

4. *Analysis.*—At a time when liability insurance is a priority for many,³³¹ the *Sherwood* court held that an insurer could be liable for the reasonable pre-notice legal expenses incurred by its insured.³³² By extending the insurer's duty to defend to encompass liability for reasonable pre-notice legal fees, the court has virtually eliminated the need for a distinction between pre- and post-notice expenses.³³³ Consequently, if an insurance company cannot establish that a delay in notice has caused it actual prejudice, the delay will have no effect on the insurer's obligation to provide a defense for its insured.

Thus, the *Sherwood* decision marks the second major change in Maryland law regarding the relationship between the liability insurer's duty to defend its insured and the insured's obligation to provide prompt notice of any claim potentially within its policy. Like the initial application of section 482, *Sherwood* eroded the notice requirement by changing the way courts construe the insured's contractual obligation to promptly notify its insurance company of a potentially covered claim.³³⁴ The Court of Appeals has finally brought Maryland

328. *Id.* (citing *Bankers & Shippers Ins. Co. v. Electro Enter.*, 287 Md. 641, 648-49, 415 A.2d 278, 282-83 (1980); *Brohawn v. Transamerica Ins. Co.*, 276 Md. 396, 409-10, 347 A.2d 842, 851 (1975)). In such a situation, the court noted that the timing of notice is irrelevant. *Id.* Because the insurer's decision not to defend was unrelated to any delay in notice, the delay should not be considered in evaluating the insurer's liability. *Id.* at 50, 698 A.2d at 1086-87.

329. *Id.* at 48, 698 A.2d at 1085. *Sherwood's* agreement with Hartford was an "occurrence" insurance policy. *Id.* at 37, 698 A.2d at 1080.

330. *Id.* at 50, 698 A.2d at 1087 (holding "that Hartford is liable for the pre-notice fees and expenses incurred by Sherwood, which the jury found to be reasonable").

331. See Kent D. Syverud, *On the Demand for Liability Insurance*, 72 TEX. L. REV. 1629, 1629 (1994) (assessing the growing demand for liability insurance and concluding that "liability insurance pervades economic life in the United States").

332. *Sherwood*, 347 Md. at 50, 698 A.2d at 1087.

333. The Court of Appeals decided that if an insurer can prove that a delay in notice caused it to suffer actual prejudice, it will not be liable for any expenses, either pre- or post-notice. *Id.* at 49, 698 A.2d at 1086. If, on the other hand, the insurer is unable to demonstrate any prejudice as a result of the delay, it will be liable for all expenses, both pre- and post-notice. *Id.* at 49-50, 698 A.2d at 1086.

334. See *supra* notes 301-312 and accompanying text (discussing how section 482 qualified the application of the notice requirement).

insurance law completely within the public policy requirements of section 482 and has allowed the insured to more fully depend on liability insurance.

a. *The Need for Dependable Liability Insurance.*—Since the 1980s, the incidence of litigation in the United States has skyrocketed.³³⁵ Along with this increase has come a growing demand for liability insurance.³³⁶ Consequently, individuals and businesses are paying very high premiums for peace of mind as well as for protection from the actual cost and burden of litigation.³³⁷ In fact, some commentators have characterized the growing public concern over liability as absolute paranoia.³³⁸ At the same time, others are urging the insured to focus ever more closely on the critical details of liability insurance.³³⁹ Noting that the policies are complex, contain a variety of conditions on coverage, and that the standards for coverage are often imprecise,³⁴⁰ attorneys are being urged to closely monitor the insurance status of their employers and clients.³⁴¹

Before *Sherwood*, this careful attention to the details of liability coverage was crucial in Maryland. Some of the best advice to corporate counsel was “[t]hink [i]nsurance [a]fter a [l]oss [o]ccurs,” and

335. See Steven W. Pottier & Robert C. Witt, *On the Demand for Liability Insurance: An Insurance Economics Perspective*, 72 TEX. L. REV. 1681, 1686 (1994) (noting the expansion of actual and potential liability in the mid-1980s).

336. See *id.* (stating that “the demand for liability insurance increased as actual and potential liability expanded”).

337. See Syverud, *supra* note 331, at 1630-31 (discussing the expense of liability insurance).

338. See *id.* at 1629 (asserting that Americans “habitually consider both the possible attendant legal liability [of our actions] and how to insure against it”).

339. See, e.g., Howard Ende et al., *Liability Insurance: A Primer for College and University Counsel*, 23 J.C. & U.L. 609, 612 (1997) (encouraging counsel to focus on liability insurance policies because of the “enormous liabilities faced by colleges and universities”); Eugene R. Anderson et al., *Liability Insurance: A Primer for Corporate Counsel*, 49 BUS. LAW. 259, 291 (1993) (urging corporate counsel to be intimately familiar with the corporation’s insurance policies, and to always “Think Insurance”).

340. The insurer’s duty to defend is governed by the “potentiality rule.” See Anderson et al., *supra* note 339, at 272; Andrew Janquitto, *Insurer’s Duty to Defend in Maryland*, 18 U. BALT. L. REV. 1, 10-17 (1988) (discussing the potentiality rule). Under this rule, an insurer has a duty to defend its insured if the allegations in the claimant’s pleadings “create a potential that the insurer will have a duty to indemnify.” *Id.* at 2. The duty to defend may even arise from allegations made in bad faith and ambiguous allegations. *Id.* at 14-15. Thus, it is not always easy to determine whether a claim falls within a policy’s coverage. While some suggest the proper rule for the insurer is “when in doubt, defend,” this is not always the practice. *Id.* at 17 (internal quotation marks omitted) (quoting 1A R. LONG & M. RHODES, *THE LAW OF LIABILITY INSURANCE* § 5.01 (1987)).

341. See Anderson et al., *supra* note 339, at 291-92 (advising counsel to “THINK INSURANCE” and to pay particular attention to the requirements and scope of corporate insurance coverage).

"[e]nsure [t]hat [a]ll [n]otices [a]re [t]imely."³⁴² Certainly, determining whether a claim might be covered by a policy can be a daunting task. For example, the "analysis requires detailed knowledge about the legal theories of the underlying claim," as well as an examination of every insurance policy sold to the corporation and any other companies' insurance policies that might list the corporation as an additional insured.³⁴³ Considering the complexity, it is not that surprising that corporations with in-house counsel fail to recognize that a claim might be covered by an existing policy.

It is even less surprising when outside counsel fails to raise the issue of insurance.³⁴⁴ Less familiar with the corporation's policies and less concerned with the eventual cost to the client (as long as the immediate funds are available), a retained attorney might fail to investigate whether the claim is covered.³⁴⁵ A complete failure to address the insurance issue can have dire consequences for the insured, who suffers the unnecessary burden of defending the entire lawsuit. But, before *Sherwood*, even a relatively slight delay in realizing that a claim might be covered by an insurance policy could bring expensive consequences. Even when a claim would fall within the policy coverage, any out-of-pocket expenditures made by the insured before notice could never be recovered.³⁴⁶

Considering the high costs of litigation, it can be critical to an individual's or business's future that the fees and expenses associated with a defense are covered. Frequently, the costs of a defense greatly

342. *Id.* (advising corporate counsel to immediately "determine which policies may insure the claim," and "act to protect the corporation by ensuring that notice is given in a timely and proper fashion").

343. *Id.* at 292.

344. This is precisely what happened in *Sherwood*. The corporation employed three attorneys at various times in the course of the Osem litigation. See *Sherwood*, 347 Md. at 37, 698 A.2d at 1080-81. Each attorney was employed only for the purpose of defending the claims brought by Osem. *Id.*; see also *supra* note 259 (noting *Sherwood*'s change in attorneys and the failure to realize that Osem's claim might be covered by the Hartford policy).

345. There are several reasons that an attorney retained to defend a single lawsuit might fail to raise the issue of insurance. First, the failure could be the same type of oversight that can plague in-house counsel. Second, the failure could be brought about by the attorney's focus on the task at hand. Retained to defend the lawsuit, insurance coverage may be out of the attorney's area of expertise or perceived range of responsibility. Third, an attorney may be motivated by a desire to maintain control of the defense. If an insurance company undertakes the defense, the previously retained attorney will have lost a client. While this is clearly an unethical motive, the possibility of deceit illustrates the complex relationships between corporations, their attorneys, and their insurers.

346. See *supra* notes 301-313 and accompanying text (discussing the state of insurance liability before the *Sherwood* decision).

exceed the amount of judgment or settlement.³⁴⁷ Consequently, the insurer's duty to defend, and assume the costs of litigation, are at least as important as its duty to indemnify.³⁴⁸ Thus, the insured that enters into a contract needs to be able to rely on its insurer to fulfill this important obligation. However, before *Sherwood*, with pre-notice expenses firmly beyond the scope of the insurer's responsibility, liability insurance was a high-risk venture.³⁴⁹ If a business or individual could not count on an insurer to cover the initial costs of a lawsuit, the high premiums for a policy appeared even less reasonable.³⁵⁰

b. *The Actual Prejudice Requirement.*—The *Sherwood* court increased the dependability of liability insurance by explicitly extending the prejudice requirement codified in section 482 to apply to pre-notice expenses.³⁵¹ Consequently, an insurer may not disclaim coverage on the basis of delayed notice unless it can prove that the delay caused it to suffer some actual prejudice.³⁵²

(1) *What is Actual Prejudice?*—Although the standard is applied inconsistently,³⁵³ “actual prejudice” is best understood considering the typical terms of an insurance contract. Courts will generally find that an insurer has been prejudiced as the result of a breach when “the purposes of the breached policy requirement are defeated.”³⁵⁴ The requirement of prompt notice is generally intended to allow the insurer to (1) investigate and evaluate claims, (2) weed out fraudulent claims, (3) evaluate its position to determine its rights

347. See Anderson et al., *supra* note 339, at 272 (stating that the insurer's duty to defend “is of paramount importance to policyholders because the costs of defense may far exceed the amount of judgments and settlements”). This was the case in the *Sherwood* litigation. *Sherwood* and Osem eventually settled for \$100,000. *Sherwood*, 347 Md. at 39, 698 A.2d at 1081. The jury later found that *Sherwood*'s reasonable expenses in defending the action, including pre-notice expenses, were \$397,366. *Id.* at 39-40, 698 A.2d at 1081 (providing a break-down of the jury award).

348. See Janquitto, *supra* note 340, at 2 (noting that “[e]ach [of the duty to defend and the duty to indemnify] is an important benefit”).

349. See Anderson et al., *supra* note 339, at 290 (noting that businesses are already “under pressure to self-insure” because it appears to be a cheaper option).

350. Much discussion has centered around the temptation to self-insure. See, e.g., *id.* (advising corporations not to self-insure despite the fact that the option appears “cheap in comparison to the cost of purchasing real insurance”).

351. See *supra* notes 332-334 and accompanying text (discussing *Sherwood*'s impact on the insurer's liability).

352. See *supra* note 299 and accompanying text (quoting section 482).

353. The standard is frequently applied without any concrete definition. See Richard L. Suter, *Insurer Prejudice: Analysis of an Expanding Doctrine In Insurance Coverage Law*, 46 ME. L. REV. 221, 222 (1994) (asserting that “courts have failed to develop a broadly recognized, comprehensive definition of the term”).

354. *Id.* at 223.

and responsibilities, (4) maintain adequate revenues and establish more accurate renewal premiums, and (5) take steps to prevent losses from similar risks in the future.³⁵⁵ Thus, where the insurer can prove that, due to the delay, it was unable to further one or more of these goals, it will not be obligated to perform the contract.³⁵⁶

(2) *How Maryland's Actual Prejudice Requirement Compares to Other Jurisdictions.*—Although the *Sherwood* decision mandates that an insurer cannot disclaim pre-notice expenses without proof of prejudice, Maryland practitioners must keep in mind that neighboring jurisdictions differ in their approach to pre-notice expenses. While the majority of states have adopted some version of the actual prejudice doctrine,³⁵⁷ most decline to apply the rules to pre-notice expenses.³⁵⁸ This may prove to be a critical consideration when advising clients on the purchase of liability insurance.

355. *Id.* at 223-24; see also *Lennon v. American Farmers Mut. Ins. Co.*, 208 Md. 424, 430, 118 A.2d 500, 503 (1955) (discussing the purposes behind the notice requirement).

356. *Suter*, *supra* note 353, at 224 (noting that courts have found prejudice "where one or more of the purposes of [the notice] requirement has been defeated"). There are also commonly noted exceptions to the prejudice requirement. *Id.* In these situations, the contract is not enforced even if there was no prejudice to the insurer. *Id.* The exceptions are (1) a bad faith delay, (2) terms in a "claims made policy," and (3) the entry of judgment before notice. *Id.* Thus, to enforce a contract against the insurer following a delay in notice, the contract must be for an "occurrence" policy, the delay must be in good faith, and notice must occur before a judgment in the claim at issue.

The basic difference between "occurrence" and "claims-made" insurance policies has been summarized as follows:

A "claims-made" policy frequently requires that the "occurrence" happen during the policy period, the claim be made against the policyholder during the policy period and that the claim be reported to the insurance company during the reporting period. In contrast, an "occurrence" policy provides coverage for injury or damage which happens during the policy period, regardless of when the claim for injury or damages is first made against the policyholder.

Anderson, *supra* note 339, at 264 (footnotes omitted).

357. See Eugene R. Anderson, *Calling Attention to the Late Notice Problem*, RISK MGMT., Nov. 1992, at 26, 34-35 (charting the late notice rules for the fifty states). As one commentator has noted:

Traditionally, if an insured failed to comply with such notification or cooperation requirements, the insurer could flatly deny coverage of the claim. Recently, however, an increasing number of courts are requiring that the insurer show that it has been prejudiced in some way before it can deny coverage for the insured's failure to comply with such requirements.

Suter, *supra* note 353, at 221 (footnote omitted).

358. See *id.*

c. *Sherwood Furthers Good Public Policy.*—In Maryland, the insured has a duty to read its insurance policy.³⁵⁹ If the insured does not object to any provision in the policy, it is presumed to have understood and consented to all the terms.³⁶⁰ Particularly where the insured is a “sophisticated business entity,” it will be bound to every term in the policy.³⁶¹ Under the Hartford-Sherwood policy, Sherwood was not only required to promptly notify the insurance company of any event that might give rise to coverage under the policy, it was explicitly forbidden from making any payments in its own defense without Hartford’s consent.³⁶² Ordinarily, as a business entity that commonly deals with contracts in various contexts, Sherwood would not be able to escape the literal consequences of these provisions.³⁶³

There is, however, an important exception to the foregoing rules of construction: when a provision of an insurance contract is against Maryland public policy, it cannot be enforced.³⁶⁴ The controlling public policy is determined, in part, by those principles set forth in state statutes, including the Insurance Code.³⁶⁵ Even when the invalidation of a provision of an insurance contract would result in expanding the insurer’s contractual commitment, the public policy must

359. *Liberty Mut. Ins. Co. v. Ben Lewis Plumbing, Heating & Air Conditioning, Inc.*, 121 Md. App. 467, 473, 710 A.2d 338, 341 (1998) (discussing obligation of insured to read and understand the terms of his or her insurance policy).

360. *Id.*

361. *Twelve Knotts Ltd. Partnership v. Fireman’s Fund Ins. Co.*, 87 Md. App. 88, 104, 589 A.2d 105, 113 (1991) (holding the insured accountable for the provisions in its policy because it was a “sophisticated business entity” and the provision was “clear and unambiguous”).

362. See *supra* notes 252-256 and accompanying text (describing the Hartford insurance policy purchased by Sherwood).

363. See *supra* note 361 and accompanying text (underscoring reasonableness of insured’s obligation to understand policy when it is a sophisticated entity with experience negotiating contracts).

364. See *Litz v. State Farm Fire & Cas. Co.*, 346 Md. 217, 224, 695 A.2d 566, 569 (1997) (stating that “[a]n insurance contract, like any other contract, is measured by its terms unless a statute, a regulation, or public policy is violated thereby” (quoting *Pacific Indem. Co. v. Interstate Fire & Cas. Co.*, 302 Md. 383, 388, 488 A.2d 486, 488 (1985))); see also Sean W. Gallagher, Note, *The Public Policy Exclusion and Insurance for Intentional Employment Discrimination*, 92 MICH. L. REV. 1256, 1258 (1994) (noting that although there is a “strong public policy favoring the enforcement of contracts as they are written,” courts refuse to enforce some provisions on the grounds that they violate public policy).

365. See *Young v. Allstate Ins. Co.*, 120 Md. App. 216, 230, 706 A.2d 650, 657 (1998) (noting that “[w]hen a clause in an insurance policy is contrary to State public policy, as set forth in the Insurance Code or other statute, it is invalid and unenforceable” (citing *Blue Bird Cas. Co. v. Amalgamated Cas. Ins. Co.*, 109 Md. App. 378, 388, 675 A.2d 122, 127 (1996) (citing *Jennings v. GEICO*, 302 Md. 352, 356, 488 A.2d 166, 168 (1985)))).

control.³⁶⁶ Thus, the public policy set forth in section 482 should override any conflicting provisions in the Hartford-Sherwood policy.

Section 482 is in direct conflict with those provisions that would limit the insured's recovery of litigation expenses when the insurance company is not harmed. The statute keeps an insured from incurring the costs of litigation for failing to give the requisite notice when the insurer is not prejudiced by the delay.³⁶⁷ Clearly, the public policy propounded by this rule puts the insured's right to recover under the insurance policy before adherence to the notice requirement. Thus, it is logical and fair that the notice requirement should not be enforced when compliance would not have changed the parties' circumstances.³⁶⁸

By eliminating the distinction between pre- and post-notice expenses, a remnant from the construction of the notice requirement as a condition precedent to coverage,³⁶⁹ the Court of Appeals created a much more reasonable relationship between the rights of insurance companies and their insured. Not only does the rule make much more sense, it holds the insurer accountable for its end of the standard liability policy, while alleviating the extreme consequences suffered by an insured who gave late notice. This fundamental fairness of the *Sherwood* rule is best illustrated by weighing the impact of the old rule on the insured against the potential effects of the *Sherwood* rule on insurance companies.

(1) *The Old Rule and the Insured.*—Before *Sherwood*, a delay in notice was a major limiting factor in the insurer's obligations, regard-

366. Cf. *Commercial Union Ins. Co. v. Harleysville Mut. Ins. Co.*, 110 Md. App. 45, 58, 675 A.2d 1059, 1066 (1996) (noting that holding the insurer liable for claims not covered by its policy or recoverable in the state where the insurance was provided "would expand the insurer's contractual commitment under the insurance policy beyond that which was contemplated by the parties," and that this would only be permissible where there is "an overriding public policy justification for doing so").

367. See *supra* note 299 and accompanying text (quoting section 482).

368. Although the *Sherwood* court did not consider a public policy argument, this is similar to the court's conclusion that, logically, where the notice requirement is no longer a condition precedent to coverage, the insurer's duty to defend should arise before notice. *Sherwood*, 347 Md. at 45, 698 A.2d at 1084. The *Sherwood* court reasoned that

[w]here . . . the duty to notify is merely a covenant . . . the logic of . . . holding [that there is no duty to defend until notice is given] becomes significantly attenuated, for it creates a time gap between the insurer's right to control the defense and its duty to provide one that has no legal underpinning.

Id.

369. *Id.* (reasoning that the distinction between pre- and post-notice obligations is logical "[w]here the duty of notification is regarded as a condition precedent to the insurer's duty to defend").

less of whether the delay could be shown to prejudice the insurer.³⁷⁰ Because the insurer's duty to defend did not arise until notice, those expenses incurred by the insured prior to notice could not be considered when computing damages caused by the insurer's eventual breach. Thus, the insured was never entitled to recover for this significant monetary loss.³⁷¹

Under this construction, after paying premiums for protection from the potentially astronomical cost of litigation, the insured would lose coverage for pre-notice expenses for failing to provide prompt notice to the insurer. Often, an insured would lose coverage for failing to identify an occurrence as potentially within the scope of the policy.³⁷² The circumstances surrounding *Sherwood* are a perfect example of the difficulty an insured might have identifying a situation that might trigger its insurance coverage. According to *Sherwood*, it never considered the possibility that Osem's claims might be covered by the Hartford policy until immediately before it gave proper notice of the lawsuit.³⁷³ Under the old rule, while the insurer would still realize the benefit of the bargain by receiving premiums, the insured's benefit would be drastically restricted if it did not realize a lawsuit might be covered.³⁷⁴ A layperson should not be held to the standard of identifying any occurrence that triggers the "potentiality of coverage" that would give rise to a legitimate duty to defend.³⁷⁵

(2) *Sherwood and the Insurer*.—Although *Sherwood* expanded the liability of the insurer as construed by the courts, it did not create a burden greater than that contemplated by the insurance company

370. See *supra* notes 299-312 and accompanying text (discussing the Maryland courts' application of section 482).

371. See *supra* notes 311-312 and accompanying text (explaining that because the insurer had no duty to defend until it received prior notice, it was never liable for expenses incurred before notice).

372. See, e.g., *Oweiss v. Erie Ins. Exch.*, 67 Md. App. 712, 715, 509 A.2d 711, 713 (1986) (stating that insured failed to notify its insurance company of an incident because there was no visible damage and no police report was filed); cf. *Lennon v. American Farmers Mut. Ins. Co.*, 208 Md. 424, 433, 118 A.2d 500, 504 (1955) (holding that the insured was not required to notify his insurance company because no covered event actually occurred).

373. *Sherwood*, 347 Md. at 38, 698 A.2d at 1081.

374. See *Ende et al.*, *supra* note 339, at 660-61 (noting that "[f]orfeiture of insurance is a massive and disproportionate penalty in relation to the policy holder's relatively harmless noncompliance with a condition in the insurance policy").

375. For a discussion of the potentiality rule, see *Janquitto*, *supra* note 340, at 10-17 (discussing the scope of the insurer's duty to defend in Maryland); see also *Travelers Indem. Co. v. Insurance Co. of N. Am.*, 69 Md. App. 664, 671, 519 A.2d 760, 764 (1987) (discussing the potentiality rule).

when it drafted the policy.³⁷⁶ In exchange for a premium and the right to control the defense, the insurer agreed to defend the insured in covered litigation.³⁷⁷ Any delay in notice that does not cause some prejudice to the insurer will not disrupt this relationship. By its nature, the prejudice requirement protects the insurer from suffering either a diminished ability to control the defense or a greater obligation for expenses.

One risk involved in placing a greater burden on the insurer is that insurance rates will increase and coverage will be less accessible to the consumer. In a case such as *Sherwood*, that risk simply does not apply. Under *Sherwood*, an insurance company can only be held liable for litigation expenses potentially within the scope of coverage when it was (1) promptly notified of the claim as required by the policy or (2) a delay in notification did not prejudice the insurer's ability to provide a defense.³⁷⁸ Thus, the insured is entitled to no more than was contemplated by the insurance company when it drafted the policy and set its premiums. Accordingly, the insurer is not really burdened by the expansion in *Sherwood*.

d. Insurance Companies Take Note.—The *Sherwood* decision represents a break in Maryland law from the rule in most jurisdictions. In fact, the Court of Appeals recognized that the *Sherwood* interpretation of section 482 was contrary to thirty years of decisions by the Court of Special Appeals.³⁷⁹ There are three points for insurance companies to consider in the *Sherwood* decision. First, the court relied on a logical interpretation of section 482 when it found that the prejudice requirement should apply evenly to pre- and post-notice expenses.³⁸⁰ Second, the court allowed the insured to recover pre-notice expenses in spite of a contract provision explicitly barring re-

376. See *supra* note 325 and accompanying text (indicating that insurers are obligated to reimburse insureds for reasonable costs absent prejudice; thus a duty to pay pre-notice expenses is not beyond the scope of coverage initially contemplated by the insurer when the policy was issued).

377. See Janquitto, *supra* note 340, at 3.

378. See *Sherwood*, 347 Md. at 48-50, 698 A.2d at 1086-87 (identifying situations that would not impact availability of coverage).

379. See *id.* at 44, 698 A.2d at 1084 (acknowledging that "[a] number of courts, including the Court of Special Appeals, have stated that the duty to defend does not arise until the insurer is notified of the claim and asked to undertake the defense").

380. See *id.* at 43-44, 698 A.2d at 1083 (citing no authority for the conclusions that (1) the duty to defend and the right to control the defense are correlative provisions, and (2) the right to control the defense necessarily attaches as soon as there is something to defend).

covery of such expenses without the company's consent.³⁸¹ Arguably, this allowance interferes with the rights of the contracting parties to realize the benefit of their bargain, yet the court completely fails to address this issue. Third, the court's discussion of the instances where an insurer either undertakes the defense following a delay in notice or declines coverage based on the delay is not within the parameters of the issue in *Sherwood*.³⁸² The Court of Appeals extended section 482 to apply to pre-notice expenses in these instances, as well as in the situation described in *Sherwood*.³⁸³

Where the insurer undertakes the defense following a delay in notice or denies coverage based on perceived prejudice resulting from the delayed notice, the company should argue that *Sherwood* does not control, because the court did not consider such facts in that case. Certainly, the decision does not apply to "claims made policies," a bad faith delay, or notice received after judgment.³⁸⁴ This may be a small consolation, however, to the insurance companies that have just been exposed to much greater potential liability.

5. *Conclusion.*—By eliminating the distinction between pre- and post-notice expenses, the Court of Appeals expanded the scope of the liability insurer's obligation to provide a defense for its insured. Increasing the dependability of liability insurance, *Sherwood's* impact on the contractual obligation of the insurer within its liability insurance policy is fair and reasonable. By holding an insurer liable for litigation expenses it would have incurred had it received notice of the claim earlier, the court does not place a greater obligation on the

381. See *id.* at 37, 698 A.2d at 1080 (noting that the Hartford policy "stated that an insured would not, except at its own cost, voluntarily make any payment, assume any obligation, or incur any expense without Hartford's consent").

382. *Id.* at 48-50, 698 A.2d at 1085-86; see also *supra* note 314 and accompanying text (discussing the issue in *Sherwood*, as framed by the Court of Appeals). Hartford denied *Sherwood's* coverage on the basis that the claim was not covered by the policy. *Sherwood*, 347 Md. at 38, 698 A.2d at 1081. Rather than limiting itself to a discussion of the instant facts, the Court of Appeals considered the obligation of the insurer when it declines coverage based on delayed notice, as well as its obligation when it undertakes the defense after such a delay. *Id.* at 48-50, 698 A.2d at 1085-86 (recognizing that the issue in *Sherwood* was not denial of coverage based on delayed notice).

383. Before *Sherwood*, no Maryland court had applied the prejudice requirement of section 482 to pre-notice expenses. See *supra* notes 301-313 and accompanying text (discussing the law in Maryland prior to *Sherwood* and concluding that under no circumstances could an insurer be obligated to reimburse pre-notice expenses). Instead, the courts repeatedly held that the insurer could not be liable for any expenses incurred by the insured before it gave proper notice. See *id.*; see also *supra* note 312 and accompanying text.

384. See *supra* note 356 (explaining the three exceptions to the prejudice rule); see also *Sherwood*, 347 Md. at 37, 698 A.2d at 1080 (noting that *Sherwood's* policy with Hartford was an "occurrence" policy).

insurer than what it contracted to provide. This decision will, in many instances, alleviate the drastic consequences that previously fell upon the insured who failed to make the difficult identification of a claim that could fall within the potentiality of coverage.

CARA J. HEFLIN

XI. PROFESSIONAL RESPONSIBILITY

A. *Expanding the Application of the Maryland Lawyers' Rules of Professional Conduct*

In *Post v. Bregman*,¹ the Court of Appeals held that an attorney may invoke a violation of Rule 1.5(e)² of the Maryland Lawyers' Rules of Professional Conduct (MLRPC or Rules) outside the disciplinary context, as a defense to a breach of contract claim, in order to render a fee-sharing agreement unenforceable.³ In so doing, the court has unequivocally recognized that the MLRPC embody an expression of public policy having the force of law.⁴ As a result, violations of other provisions in the MLRPC similarly may be recognized in proceedings outside the disciplinary context. In a case subsequent to *Bregman*, *Son v. Margoliuss, Mallios, Davis, Rider & Tomar*,⁵ the Court of Appeals interpreted and applied *Bregman* in a manner suggesting this result.⁶

1. *The Case*.—In August 1989, Stanley Taylor met with Andrew Bregman after finding himself without an attorney in his pending workers' compensation suit.⁷ Because Bregman's firm did not handle workers' compensation cases, he referred Taylor to Post, an attorney specializing in this area of law.⁸ Taylor retained Post to represent him in both his workers' compensation suit and in a third-party action against the suppliers of the toxic substances that he believed to have

1. 349 Md. 142, 707 A.2d 806 (1998).

2. Rule 1.5(e) provides:

A division of fee between lawyers who are not in the same firm may be made only if:

(1) the division is in proportion to the services performed by each lawyer or, by written agreement with the client, each lawyer assumes joint responsibility for the representation;

(2) the client is advised of and does not object to the participation of all the lawyers involved; and

(3) the total fee is reasonable.

MD. LAWYERS' RULES OF PROFESSIONAL CONDUCT Rule 1.5(e) (1998).

3. *Bregman*, 349 Md. at 168, 707 A.2d at 818.

4. *See id.* (adopting the premise that MLRPC 1.5(e) "constitute[s] a supervening statement of public policy to which fee-sharing agreements by lawyers are subject and that the enforcement of Rule 1.5(e) is not limited to disciplinary proceedings").

5. 349 Md. 441, 709 A.2d 112 (1998).

6. *See id.* at 465, 709 A.2d at 123-24 (remanding for consideration the issue whether the payment of a fee should be rescinded as a violation of Rule 5.4 or 7.2, in light of *Bregman*).

7. *Bregman*, 349 Md. at 147, 707 A.2d at 808. Taylor's suit arose after he was diagnosed with chronic myelogenous leukemia. *Id.* Taylor's first attorney, who was not a party to these proceedings, withdrew when Taylor's benefits were initially denied. *Id.*

8. *Id.* at 147-48, 707 A.2d at 808.

caused his illness.⁹ The retainer agreement regarding the third-party action entitled Post to one-third of any recovery if the case was settled and forty percent of the recovery if a complaint was filed and discovery undertaken.¹⁰ The agreement also provided that if Post retained co-counsel, he would not increase the fees already agreed to by Taylor.¹¹

In June 1990, Post retained the firm of Connerton, Ray & Simon (Connerton) as co-counsel in the third-party tort action against the manufacturers of the toxic substance.¹² Post agreed to split equally seventy-five percent of any recovery with Connerton, with the remaining twenty-five percent going to Bregman.¹³ On June 14, 1990, Post wrote a letter to Bregman confirming that Bregman had been the referring attorney in both the workers' compensation claim and the third-party action.¹⁴ In this letter, Post referred to a previous discussion regarding Bregman's continuing role in the litigation and indicated that Connerton had agreed that Bregman should expect to "contribute 25% of all out-of-pocket expenses and an appropriate allocation of the labors of litigation."¹⁵ Bregman claimed that he responded to this letter on June 21, 1990,¹⁶ writing that his firm would expect to receive the entire twenty-five percent fee even if they did not do this proportion of the work on the case and clarifying that it was Post's responsibility to delegate the appropriate amount of work.¹⁷

Although the Connerton firm, as lead counsel, filed suit against the manufacturers of the chemical at issue in the Superior Court of the District of Columbia in September 1990, Connerton withdrew from the case in October of 1991.¹⁸ As a result, Post contacted the firm of Paulson, Nace, Norwind & Sellinger (Paulson), which agreed to become lead counsel and to pay for the expenses associated with this role.¹⁹ To create this arrangement with Paulson, Post was forced to restructure the existing fee agreements, conceding to Paulson's demand that it receive two-thirds, rather than one-half, of the total con-

9. *Id.* at 148, 707 A.2d at 808.

10. *Id.*

11. *Id.*, 707 A.2d at 808-09.

12. *Id.*, 707 A.2d at 809.

13. *Id.* at 149, 707 A.2d at 809.

14. *Id.* at 148, 707 A.2d at 809.

15. *Id.* at 149, 707 A.2d at 809.

16. Post claimed never to have seen this letter, although he also did not deny receiving it, and a copy properly addressed to Post became part of the record. *Id.*

17. *Id.*

18. *Id.*

19. *Id.* at 149-50, 707 A.2d at 809.

tingency fee.²⁰ In a letter dated December 21, 1991, Post notified Bregman of the new arrangement, writing that the new agreement with Paulson was “reasonable considering the fact that he [Barry Nace, of Paulson] is taking on the expenses as well.”²¹ With Paulson’s firm taking two-thirds of any fees generated, Post proposed that he divide the remaining one-third with Bregman on a “60/40 basis in an effort to be reasonably fair.”²² Bregman accepted the proposal, adding in handwriting at the bottom of Post’s letter that his (Bregman’s) portion of the fee should include costs and unpaid fees owed; this addition was agreed to and initialed by Post.²³

Taylor’s third-party action was settled on November 1, 1994, with Post receiving \$260,000, one-third of the gross fee.²⁴ Although Post conceded that Bregman’s share of the fee was between \$80,000 and \$90,000, Post offered \$50,000 to settle the matter on the ground that Bregman had contributed little to the litigation.²⁵ Bregman rejected this offer the next day.²⁶ On November 28, 1994, Post filed a complaint for declaratory relief in the Circuit Court for Montgomery County, seeking the court’s declaration that the December 21, 1991 letter agreement between Post and Bregman was “unenforceable as against public policy.”²⁷ Post alleged that “Bregman drafted no documentation, participated in no court depositions, attended no court hearings or conferences, and expended no material amount of time or money on the case.”²⁸ Post argued that Bregman’s demand for forty percent of Post’s share of the fee was a “‘per se’ violation of Rule 1.5(e) of the Maryland Rules of Professional Conduct” because Bregman did not take any significant responsibility in the litigation.²⁹

20. *Id.* at 149-50, 707 A.2d at 809-10.

21. *Id.* at 150, 707 A.2d at 810.

22. *Id.*

23. *Id.*

24. *Id.*

25. *Id.* at 150-51, 151 n.3, 707 A.2d at 810 & n.3.

26. *Id.* at 151, 707 A.2d at 810.

27. *Id.* The Complaint erroneously referred to the letter of December 20, sent by Post to Nace, an attorney at Paulson, although Bregman’s acceptance of Post’s December 21 letter constituted the agreement between them. *Id.* at 151 n.4, 707 A.2d at 810 n.4.

28. *Id.* at 151, 707 A.2d at 810.

29. *Id.* In an amended complaint, Post also alleged that there was no written agreement with Taylor for joint representation; that Taylor was advised, and consented to, joint representation of all co-counsel except for Bregman; that in order to obtain the division of fees claimed by Bregman, Bregman would have been required to perform services in proportion thereto; and that the existence of “an alleged fee sharing agreement” does not create an exception to the requirements of Rule 1.5(e). *Id.* at 151-52, 707 A.2d at 810.

In response to Post's complaint, Bregman filed a counterclaim for declaratory judgment and breach of the fee-splitting contract.³⁰ Bregman argued that his firm completed a substantial amount of work associated with the third-party action, was listed as co-counsel of record through the duration of the tort litigation, and did not violate Rule 1.5(e).³¹ Moreover, Bregman asserted that, even if a violation of Rule 1.5(e) occurred, Post's actions were the cause of such a violation and should therefore not impinge on his right to receive his share of the fee. Post then renewed his earlier motion for summary judgment.³²

Although Post and Bregman disputed numerous facts, they did stipulate to the following: (1) Bregman was listed as co-counsel in the pleadings throughout the Taylor tort litigation; (2) Taylor did not enter into separate retainer agreements with the Connerton or Paulson firms; (3) neither Post nor the Paulson firm made an accounting of the time they spent on the Taylor litigation; (4) Bregman's firm assisted in drafting the initial and amended complaints filed in the Taylor litigation; and (5) Bregman's firm did not fail to perform every task assigned to it throughout the course of the Taylor litigation.³³

The circuit court, viewing the matter as a breach of contract case, found that Post's December 20, 1991 letter to Bregman constituted a contract and that Post had breached it.³⁴ The circuit court reasoned that the ethical strictures of Rule 1.5(e) did not constitute a defense to the breach of contract, especially because Post himself made the proposal at issue.³⁵ The circuit court granted Bregman's motion for summary judgment based on the breach of contract counterclaim, awarded him a \$104,000 fee plus interest and costs of litigation, and thus rendered Post's motion for declaratory judgment moot.³⁶

In Post's appeal to the Court of Special Appeals, he asserted, among other things, that the circuit court erred in finding that the fee agreement was not governed by Rule 1.5(e) of the MLRPC.³⁷ While acknowledging Post's general assertion that parties entering into a contract do so with knowledge that their agreement incorporates ex-

30. *Id.* at 152, 707 A.2d at 810.

31. *Id.*, 707 A.2d at 810-11.

32. *Id.*, 707 A.2d at 811.

33. *Id.* at 152-53, 707 A.2d at 811.

34. *Id.* at 155, 707 A.2d at 812.

35. *Id.*

36. *Id.* at 155-56, 707 A.2d at 812.

37. *Id.* at 156, 707 A.2d at 812.

isting law,³⁸ the appellate court held that the MLRPC have never been construed as the kind of “law” that traditionally has been incorporated into contracts.³⁹ Instead, the appellate court classified the MLRPC as rules that merely “govern the conduct of lawyers in an effort to maintain the integrity of the legal profession.”⁴⁰ In light of this limited scope, the court determined that it could not elevate the Rules of Professional Conduct to the height of statutes enacted through the full legislative process.⁴¹

Post also argued that the MLRPC constitute “judicial precedent” and as such should be read into the agreement.⁴² Rejecting this argument, the court reasoned that, even if contracts do incorporate judicial precedent, the MLRPC lack the distinguishing characteristic of judicial precedent: “slow and deliberate *interpretation* of already existing law, rather than the creation of new law.”⁴³ By contrast to “already existing law” originating from the legislature or common law, the MLRPC are promulgated by the Court of Appeals of Maryland and subject to change at any time.⁴⁴ Finally, the appellate court cited the Rules themselves, which provide that “*nothing in the Rules should be deemed to augment any substantive legal duty of lawyers or the extra-disciplinary consequences of violating such a duty.*”⁴⁵

The Court of Appeals granted certiorari to determine “whether a fee-sharing agreement between lawyers is subject to MLRPC Rule 1.5(e) and may be rendered unenforceable if in violation of that rule.”⁴⁶

38. Post v. Bregman, 112 Md. App. 738, 757, 686 A.2d 665, 674 (1996), *rev'd*, 349 Md. 142, 707 A.2d 806 (1998).

39. See *id.* at 758-59, 686 A.2d at 674-75 (distinguishing between “rules passed by the judiciary for the purpose of regulating the conduct of attorneys” and “[s]tatutes . . . [which] are law for the purposes of interpreting contracts”).

40. *Id.* at 758, 686 A.2d at 674.

41. See *id.* at 759, 686 A.2d at 674-75 (distinguishing legislative enactments from rules passed by the judiciary, which are grounded in “the fierce protection that the judicial branch must exercise of its ability to govern itself free from interference by the legislature”).

42. *Id.* at 759-60, 686 A.2d at 675. Post derived this argument from the general proposition that “parties to a contract are presumed to contract mindful of existing law and that all relevant laws, including judicial precedent, are read into the agreement just as if expressly provided by them.” *Id.* at 756, 686 A.2d at 673 (citing *Wright v. Commercial & Sav. Bank*, 297 Md. 148, 153, 464 A.2d 1080, 1083 (1983)).

43. *Id.* at 761, 686 A.2d at 676.

44. *Id.*

45. *Id.* at 762, 686 A.2d 676 (quoting MD. LAWYERS’ RULES OF PROFESSIONAL CONDUCT Scope Note (1996)).

46. *Bregman*, 349 Md. at 146-47, 707 A.2d at 808. The court also considered whether there was a sufficient dispute of material fact regarding Bregman’s performance to preclude summary judgment. *Id.*

2. *Legal Background.*—Since the adoption of the Maryland Lawyers' Rules of Professional Conduct, Maryland courts have given the rules varying effect outside the realm of the disciplinary context. While some cases illustrate that the MLRPC will be narrowly applied, other cases stand for the proposition that Maryland has consistently given effect to the MLRPC outside the area of disciplinary proceedings.⁴⁷ The competing paradigms set forth in the cases will be examined, with particular attention on those suggesting the position ultimately taken in *Bregman*. In addition, cases from other jurisdictions applying their version of Rule 1.5 will be discussed. Finally, a brief examination of case law involving legal malpractice will help to illustrate the potential impact of the *Bregman* decision. Before these discussions, however, a review of Rule 1.5 and the Court of Appeals's power to govern the bar under the MLRPC is necessary in order to provide a proper historical and theoretical framework.

a. *Rule 1.5(e) and Court's Power to Govern the Bar Under MLRPC.*—The Maryland Lawyers' Rules of Professional Conduct, which are based on the American Bar Association (ABA) Model Rules of Professional Conduct, were adopted by the Court of Appeals on April 15, 1986, and took effect on January 1, 1987.⁴⁸

The court adopted ABA Model Rule 1.5(e) exactly as it was written.⁴⁹ The predecessor to MLRPC 1.5(e) was Maryland's Disciplinary Rule 2-107, which was superseded in 1987.⁵⁰ MLRPC 1.5(e) significantly expanded Rule 2-107 by allowing fee splitting between lawyers without regard to the proportion of services performed, so long as each of the lawyers assumed joint responsibility for the client's case.⁵¹

47. See *id.* at 164-65, 707 A.2d at 817 (noting that "[t]his Court and indeed most courts, have given effect to at least some of the rules embodied in the Code outside the disciplinary context," and citing cases).

48. 13 Md. Reg. 3 (1986). Since 1983, the year in which the ABA adopted and promulgated the Model Rules of Professional Conduct, thirty-nine states and the District of Columbia have adopted the ABA's Model Rules. See 2 GEOFFREY C. HAZARD, JR. & W. WILLIAM HODES, *THE LAW OF LAWYERING: A HANDBOOK ON THE MODEL RULES OF PROFESSIONAL CONDUCT* app. 4 at 1269-70 (2d ed. Supp. 1998) (listing in alphabetical order the states that have adopted the ABA standards).

49. Compare MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.5(e) (1983) with MD. LAWYERS' RULES OF PROFESSIONAL CONDUCT Rule 1.5(e) (1987). See also *supra* note 2 (containing the text of the Maryland rule).

50. See MD. LAWYERS' RULES OF PROFESSIONAL CONDUCT Editor's Note (1987) (noting that the Md. Code of Professional Responsibility, which contains Canon 2 DR-2-107, is superseded by the MLRPC, which contains 1.5(e), effective January 1, 1987).

51. See *supra* note 2 for the text of MLRPC 1.5(e). Disciplinary Rule 2-107(A) allowed a division of fees only if:

(1) The client consents to employment of the other lawyer after a full disclosure that a division of fees will be made.

Prior to *Bregman*, no Maryland court had issued a ruling interpreting MLRPC 1.5(e).⁵²

The Court of Appeals has recently recognized its dominion over the regulation of the state bar. In *Attorney General v. Waldron*,⁵³ the court ruled that regulating the practice of law falls under the “constitutional grant of judicial authority to the courts of this State,”⁵⁴ which is “reposed inherently in the judiciary.”⁵⁵ The court made it clear that, although it must defer to statutes of the legislative branch, the constitution mandates that nothing compromise the judiciary’s power to conduct its independent functions, one of which is regulating the practice of attorneys in the state.⁵⁶

b. General Application of MLRPC Outside of Disciplinary Proceedings.—The Court of Appeals’s decision in *Bregman* implicates the broader issue of the applicability of the MLRPC outside of the disciplinary context; a review of Maryland law addressing this issue is therefore necessary. The Scope Note accompanying the MLRPC asserts that “[v]iolation of a Rule should not give rise to a cause or action nor should it create any presumption that a legal duty has been breached.”⁵⁷ Moreover, using any of the Rules as procedural weapons

(2) The division is made in proportion to the *services performed and responsibility assumed* by each.

(3) The total fee of the lawyers does not clearly exceed reasonable compensation for all legal services they rendered the client.

MD. CODE OF PROFESSIONAL RESPONSIBILITY DR 2-107(A) (1984) (repealed 1987) (emphasis added).

52. See MD. LAWYERS’ RULES OF PROFESSIONAL CONDUCT Rule 1.5(e) (Comment) (listing no cases).

53. 289 Md. 683, 426 A.2d 929 (1981).

54. *Id.* at 692, 426 A.2d at 934 (citations omitted).

55. *Id.* at 694, 426 A.2d at 936 (citations omitted).

56. *Id.* at 699, 426 A.2d at 938. This case was relied upon extensively by the majority in *Bregman* for the proposition that the MLRPC constitute public policy and have the force of law. See *Bregman*, 349 Md. at 163, 707 A.2d at 816.

57. MD. LAWYERS’ RULES OF PROFESSIONAL CONDUCT Scope Note (1988). The Note goes on to state that:

The Rules are designed to provide guidance to lawyers and to provide a structure for regulating conduct through disciplinary agencies. They are not designed to be a basis for civil liability. Furthermore, the purpose of the Rules can be subverted when they are invoked by opposing parties as procedural weapons. The fact that a Rule is a just basis for a lawyer’s self-assessment, or for sanctioning a lawyer under the administration of a disciplinary authority, does not imply that an antagonist in a collateral proceeding or transaction has standing to seek enforcement of the Rule. Accordingly, nothing in the Rules should be deemed to augment any substantive legal duty of lawyers or the extra-disciplinary consequences of violating such a duty.

Id.

undermines the purposes of the Rules.⁵⁸ Case law illustrates that courts in Maryland abide by the principal that a violation of a rule shall not create a basis for liability.

An example of a court's limited application of the MLRPC is found in the case of *In re Criminal Investigation No. 13*.⁵⁹ The appellant, a chemical company, was under investigation by the Attorney General for alleged violations of Maryland's Hazardous Substance Control Law and the Water Pollution Control Law.⁶⁰ The company insisted that its counsel be present if the Attorney General's Office interviewed any of its employees.⁶¹ When the Attorney General's Office informed the company that it would not honor their request when interviewing nonmanagerial employees, the company filed an ex parte injunction, relying on Rule 4.2.⁶² The Circuit Court for Dorchester County denied the injunction, pointing to the long-standing rule that courts of equity do not have jurisdiction in criminal cases.⁶³ The Maryland Court of Special Appeals affirmed on the same ground, but also stated that the company had inappropriately relied on Rule 4.2 in presenting its argument.⁶⁴

Similarly, in *Kersten v. Van Grack*,⁶⁵ the Court of Special Appeals rejected the claim, based on the MLRPC, that service of process should be a nondelegable duty of an attorney.⁶⁶ In *Kersten*, a law firm (Van Grack), having been engaged to sue Carol Kersten and others in a third party action, employed a process server, Richard Allen James, to serve process on Kersten.⁶⁷ James submitted false affidavits stating that he had personally served Kersten, when in fact he had not done so. As a result Kersten never received notice of the suit, never re-

58. *Id.*

59. 82 Md. App. 609, 573 A.2d 51 (1990).

60. *Id.* at 610-11, 573 A.2d at 52.

61. *Id.* at 611, 573 A.2d at 52-53.

62. *Id.*, 573 A.2d at 53. Rule 4.2 provides: "In representing a client, a lawyer shall not communicate about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so." MD. LAWYERS' RULES OF PROFESSIONAL CONDUCT Rule 4.2 (1990).

63. *In re Criminal Investigation No. 13*, 82 Md. App. at 611-12, 573 A.2d at 53.

64. *See id.* at 612, 573 A.2d at 53 (arguing that, even if the Attorney General's Office violated Rule 4.2, this "would not provide the appellant with the solace it seeks," on the ground that the Rules do "'not give rise to a cause of action [or] create any presumption that a legal duty has been breached'" (quoting MD. LAWYERS' RULES OF PROFESSIONAL CONDUCT Scope Note (1990))).

65. 92 Md. App. 466, 608 A.2d 1270 (1992).

66. *Id.* at 476, 608 A.2d at 1275-76.

67. *Id.* at 467, 608 A.2d at 1271.

sponded to it, and had a default judgment entered against her.⁶⁸ Kersten then sued Van Grack on the ground that the law firm was liable for the actions of its process server,⁶⁹ arguing in part that the firm was liable for these acts because, although the process server was an independent contractor, service of process was a “non-delegable dut[y] of the employer.”⁷⁰ Kersten relied on the Maryland Rules of Professional Conduct “as an expression of public policy that service of process should be a non-delegable duty of attorneys.”⁷¹ The court rejected that argument, pointing to the proscription in the Scope Note against the use of the rules outside of disciplinary proceedings.⁷² Moreover, the court held that “[t]he Maryland Rules of Professional Conduct . . . are not a reflection of public policy, nor do they provide a basis upon which to impose liability.”⁷³

Although courts refused to apply the MLRPC as a basis for civil liability prior to *Bregman*, they have given some effect to the Rules in a number of cases outside the disciplinary context, thereby suggesting a development towards the court’s holding in *Bregman*.⁷⁴ The following cases, which are discussed in *Bregman* itself, illustrate such a progression.

In *Cardin v. State*,⁷⁵ the Maryland judiciary narrowly applied a provision of the MLRPC outside the realm of disciplinary proceedings. The case involved Jerome Cardin, an attorney convicted of five counts of theft for improper receipts of monies during the course of representing a financial institution.⁷⁶ Appealing his conviction on a number of grounds, Cardin argued that the jury instructions given by the trial judge improperly invoked Disciplinary Rule 2-107, the predecessor to MLRPC 1.5(e).⁷⁷ The court held that the jury instruction

68. *Id.* at 467-68, 608 A.2d at 1271.

69. *Id.* at 467, 608 A.2d at 1271. The Court of Special Appeals rejected Kersten’s claim that the firm was vicariously liable for the acts of the process server. *Id.* at 468-75, 608 A.2d at 1272-75.

70. *Id.* at 475, 608 A.2d at 1275.

71. *Id.* at 476, 608 A.2d at 1275.

72. *Id.* (citing MD. LAWYERS’ RULES OF PROFESSIONAL CONDUCT Scope Note (1992)).

73. *Id.* (citing MD. LAWYERS’ RULES OF PROFESSIONAL CONDUCT Scope Note (1992); *In re Criminal Investigation No. 13*, 82 Md. App. 609, 612-13, 573 A.2d 51 (1990)); see also *supra* notes 59-64 (detailing the court’s holding in *In re Criminal Investigation No. 13*).

74. See *infra* notes 75-114 (giving examples of cases where courts applied the rules outside of the disciplinary context).

75. 73 Md. App. 200, 533 A.2d 928 (1987).

76. See *id.* at 204-09, 533 A.2d at 930-33 (discussing the facts leading up to the attorney’s convictions, as well as the counts against the attorney upon which the convictions were based).

77. See *id.* at 209-10, 533 A.2d at 933 (listing Cardin’s contentions of error on appeal). The judge instructed the jury, in pertinent part, as follows:

was not erroneous, on the ground that "[i]t was entirely proper for the jury to consider whether a fee splitting arrangement that would violate the canons of ethics governing Cardin's profession was consistent with a bona fide belief that he was entitled to the money."⁷⁸ The use of the Rules in this instance, to draw inferences concerning the defendant's state of mind, illustrates that Maryland courts were willing to recognize the public policy implications of the Rules prior to *Bregman*. Although not a groundbreaking proclamation of the MLRPC's status as public policy, the use of the ethics rule in this limited instance nonetheless contravened the strict proscription on the use of the rules set forth in the Scope Note.⁷⁹

The Court of Appeals similarly applied a provision of the MLRPC in *Harris v. David S. Harris, P.A.*,⁸⁰ a worker's compensation case involving an appeal of the disqualification of the injured claimant's attorney. David Harris, an attorney, injured his back in the course of his employment.⁸¹ Harford Mutual Insurance Co. (Harford), the employer's insurance carrier, appealed to the Circuit Court for Baltimore City following a Worker's Compensation Commission ruling in favor of Harris.⁸² After a mistrial was declared in Circuit Court, and prior to the start of the new trial, Harford filed and was granted a Motion for Disqualification of Claimant's Attorney on the ground that, because Harris's attorney was a member of his firm, proceeding in the suit would be inconsistent with the MLRPC, which state that a lawyer shall

Any conduct by a defendant related to his receipt and handling of money which was likely to mislead or conceal is relevant to the question of intent.

You have heard evidence that certain conduct of the defendant may be unethical fee splitting in violation of Disciplinary Rule 2-107 of the Maryland Code of Professional Responsibility for attorneys

A violation of Disciplinary Rule 2-107 is not a crime in and of itself. However, if you conclude that the defendant's conduct violated Disciplinary Rule 2-107, you may consider that evidence as relevant to the defendant's intent, the defendant's good character or lack thereof, the defendant's knowledge of the conduct of Jeffrey Levitt [one of the purchasers of Old Court Savings and Loan, with which Cardin had been engaged in a prohibited fee splitting agreement] when the defendant received funds from Mr. Levitt, and whether the defendant had a good faith honest belief that he was entitled to the monies he received.

Id. at 212-13, 533 A.2d at 934. For the text of DR 2-107, see *supra* note 51.

78. *Cardin*, 73 Md. App. at 215, 533 A.2d at 935.

79. See *supra* notes 57-58 and accompanying text (describing the limitations on the application of the disciplinary rules set forth in the Scope Note); see also *supra* notes 59-73 (describing two cases in which courts heeded the Scope Note's limitation).

80. 310 Md. 310, 529 A.2d 356 (1987).

81. *Id.* at 313, 529 A.2d at 357. Harris was the sole stockholder and president of David S. Harris, P.A., and was represented throughout the litigation by a member of his firm. *Id.*

82. *Id.*

not act as an advocate at a trial in which the lawyer is likely to testify.⁸³ The Court of Appeals granted certiorari to answer the question of whether “an immediate appeal lies from a pretrial order disqualifying counsel in a civil case.”⁸⁴ Although the court found that the collateral order doctrine precluded Harris from immediately appealing the circuit court’s interlocutory order, it held that “in further proceedings in this case counsel’s conduct will be governed by Rule 3.7.”⁸⁵ By clearly stating that the MLRPC would apply to counsel in subsequent proceedings, the court once again applied the Rules in a context outside of disciplinary proceedings.⁸⁶ Although far from an explicit recognition of the MLRPC as public policy, the court’s application of the Rules nonetheless illustrates its willingness to overlook the proscription in the Scope Note and recognize the strength and relevance of the MLRPC outside the context of disciplinary proceedings.

In *Prahinski v. Prahinski*,⁸⁷ the Court of Appeals looked to the Rules of Professional Conduct in deciding whether the goodwill of a solo law practice constituted marital property.⁸⁸ *Prahinski* originated as a divorce proceeding between Leo and Margaret Prahinski in the Circuit Court for Prince George’s County.⁸⁹ After extensively reviewing decisions in other jurisdictions, the Court of Appeals distinguished the goodwill of a legal practice from that of other professions or businesses by virtue of the fact that “a lawyer’s goodwill cannot be sold by the lawyer.”⁹⁰ Moreover, the court noted that “[o]f equal importance is the fact that Maryland lawyers are governed by the Rules

83. *Id.* Harford alleged that Harris’s attorney violated Rule 3.7, which provides:

(a) A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness except where:

(1) the testimony relates to an uncontested issue;

(2) the testimony relates to the nature and value of legal services rendered in the case; or

(3) disqualification of the lawyer would work substantial hardship on the client.

(b) A lawyer may act as advocate in a trial in which another lawyer in the lawyer’s firm is likely to be called as a witness unless precluded from doing so by Rule 1.7 [Conflict of Interest: General Rule] or Rule 1.9 [Conflict of Interest: Former Client].

MD. LAWYERS’ RULES OF PROFESSIONAL CONDUCT Rule 3.7 (1987).

84. *Harris*, 310 Md. at 313-14, 529 A.2d at 358.

85. *Id.* at 320, 529 A.2d at 361.

86. *Id.*

87. 321 Md. 227, 582 A.2d 784 (1990).

88. *Id.* at 228-29, 241, 582 A.2d at 784, 790-91.

89. *Id.* at 228, 582 A.2d at 784. The Circuit Court ordered a monetary award for one-half of the value of the law practice to the wife, who was the secretary at the inception of the firm and later became its office manager. *Id.*

90. *Id.* at 241, 582 A.2d at 790.

of Professional Conduct, which deal specifically with situations in which lawyers and non-lawyers work together.”⁹¹ The court pointed out that Rule 5.4⁹² “clearly prohibits Leo from making Margaret a partner in his law practice.”⁹³ In light of this prohibition, the court held that the goodwill of a spouse’s legal practice is not marital property.⁹⁴ Like the *Cardin* and *Harris* courts, the court in this instance did not explicitly recognize the notion that the MLRPC constitute public policy.⁹⁵ However, by reasoning that lawyers operate under the Rules, and that Rule 5.4 prohibited Margaret from becoming a partner in the firm, the court recognized the strength and relevance of the MLRPC outside of disciplinary proceedings. The court’s treatment of the MLRPC reflected its growing willingness to equate the rules with public policy.

In *Harris v. Baltimore Sun Co.*,⁹⁶ the Court of Appeals looked to Rule 1.6⁹⁷ and its relationship to the Maryland Public Information Act⁹⁸ (MPIA) in order to clarify the duties of a public defender when

91. *Id.*, 582 A.2d at 791.

92. Rule 5.4 provides in pertinent part:

(b) A lawyer shall not form a partnership with a nonlawyer if any of the activities of the partnership consist of the practice of law. . . .

(d) A lawyer shall not practice with or in the form of a professional corporation or association authorized to practice law for profit, if:

(1) a nonlawyer owns any interest therein, except that a fiduciary representative of the estate of a lawyer may hold the stock or interest of the lawyer for a reasonable time during administration;

(2) a nonlawyer is a corporate director or officer thereof; or

(3) a nonlawyer has the right to direct or control the professional judgement of the lawyer.

MD. LAWYERS’ RULES OF PROFESSIONAL CONDUCT Rule 5.4 (1990).

93. *Prahinski*, 321 Md. at 241, 582 A.2d at 791.

94. *Id.*

95. See *supra* notes 75-86 and accompanying text (describing the court’s treatment of the MLRPC in *Cardin* and *Harris*).

96. 330 Md. 595, 625 A.2d 941 (1993).

97. Rule 1.6 provides in pertinent part:

(a) A lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraph (b).

(b) A lawyer may reveal such information to the extent the lawyer reasonably believes necessary:

(1) to prevent the client from committing a criminal or fraudulent act . . . ;

(2) to rectify the consequences of a client’s criminal or fraudulent act . . . ;

(3) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client . . . ;

(4) to comply with these Rules, a court order or other law.

MD. LAWYERS’ RULES OF PROFESSIONAL CONDUCT Rule 1.6 (1993).

98. MD. CODE ANN., STATE GOV’T §§ 10-611 to -628 (1993).

requested to disclose information regarding his client.⁹⁹ In *Harris*, the Baltimore Sun (Sun), under the MPIA, sought records of expenses incurred by the Office of the Public Defender (OPD) in a leading capital murder case.¹⁰⁰ OPD refused to turn over the records on the ground that they were confidential under Rule 1.6, and thus covered by section 10-615 of the MPIA, which required the custodian not to release confidential records.¹⁰¹ The Office of the Public Defender argued that OPD attorneys owed their client the same level of confidentiality under Rule 1.6 demanded from all attorneys in their dealings.¹⁰² The court weighed the requirements of Rule 1.6 in interpreting the limits of the MPIA, noting that the MLRPC “are designed to provide guidance to lawyers and to provide a structure for regulating conduct through disciplinary agencies.”¹⁰³ In looking to the MLRPC to make the crucial determination of whether the OPD attorney had an obligation to release the records, the court implicitly recognized the relevance of the Rules outside the scope of disciplinary proceedings. Notably absent from the court’s interpretation and application of Rule 1.6 was any discussion of the Scope Note’s prohibition against using the Rules outside of disciplinary proceedings.¹⁰⁴

In *Advance Finance Co. v. Trustees of Client’s Security Trust Fund*,¹⁰⁵ the Court of Appeals acknowledged that the Rules did not provide any basis for civil liability, but applied Rule 1.15, concerning a lawyer’s obligation to safeguard a client’s property, to determine whether the fiduciary status of attorneys entitled a consumer loan company to reimbursement from the Clients’ Security Trust Fund (the Fund) for unrepaid loans to the attorneys’ clients.¹⁰⁶ *Advance Finance Co.* (*Advance*) was seeking reimbursement for loans it had made to personal

99. See *Harris*, 330 Md. at 597, 625 A.2d at 942 (declaring that the appeal “involves the scope of counsel’s duty of confidentiality” under Rule 1.6); see also James V. McFaul, Note, *Narrowing the Scope of the Rule of Confidentiality*, 53 MD. L. REV. 963, 975 (1994) (criticizing *Harris* for limiting the scope of confidentiality under Rule 1.6, especially in relation to public agencies affected by the Maryland Public Information Act).

100. *Harris*, 330 Md. at 597, 625 A.2d at 942. The capital murder trial was that of John Frederick Thanos, who was charged with two counts of murder in Baltimore County. *Id.* at 598, 625 A.2d at 942. Specifically, the Sun sought records for “receipts for ‘motel, meal and travel’ for those [public defender] attorneys; and records of the fees and expenses paid to four expert witnesses.” *Id.* at 599, 625 A.2d at 942.

101. *Id.* at 599-600, 625 A.2d at 943.

102. *Id.* at 600, 625 A.2d at 943.

103. *Id.* at 603, 625 A.2d at 944-45 (quoting MD. LAWYERS’ RULES OF PROFESSIONAL CONDUCT Scope Note (1993)).

104. See *supra* notes 57-58 and accompanying text (discussing the Scope Note’s prohibitions on use of the rules).

105. 337 Md. 195, 652 A.2d 660 (1995).

106. *Id.* at 204-11, 652 A.2d at 664-67.

injury plaintiffs secured by assignments of future earnings from their personal injury claims.¹⁰⁷ The loans were never repaid because the two attorneys representing a number of the personal injury plaintiffs never remitted the loan arrearages to Advance.¹⁰⁸ Advance, who won default judgments against the two subsequently disbarred attorneys, sought repayment of the loans from the Fund, which denied their claim.¹⁰⁹ The purpose of the Fund, created by the Court of Appeals under a grant of authority by the General Assembly and financed by state bar fees, is "to maintain the integrity of the legal profession by paying money to reimburse losses caused by defalcations of lawyers."¹¹⁰ The Fund denied Advance's claim on the grounds that the attorneys were not attorneys for Advance, nor acting as fiduciaries for the company.¹¹¹ In reviewing the Fund's denial, the court acknowledged Advance's argument that Rule 1.15(b) imposed fiduciary duties on the attorneys.¹¹² The court examined the history and commentary regarding Rule 1.15(b) and concluded that, in view of this Rule and the statutory purpose of the Fund, the attorneys were fiduciaries for Advance.¹¹³ The court was careful to point out that it had merely recognized the fiduciary duty of the two attorneys, and that the Rule did not create a basis for civil liability, which would be contrary to the guidance of the Scope Note to the MLRPC.¹¹⁴ However, in using Rule 1.15(b) to confer fiduciary status on the attorneys, and hence disbursement by the Fund to a nonclient (Advance), the court nonetheless recognized the impact the Rules have outside the disciplinary context. This case, like its predecessors applying the MLRPC, illus-

107. *Id.* at 197, 652 A.2d at 661.

108. *Id.*

109. *Id.* at 199, 652 A.2d at 661-62.

110. *Id.* at 200, 652 A.2d at 662 (quoting MD. CODE ANN., BUS. OCC. & PROF. § 10-311(b) (1989)).

111. *Id.* at 199, 652 A.2d at 662.

112. *Id.* at 204-05, 652 A.2d at 664-65. Rule 1.15(b) provides:

(b) Upon receiving funds or other property in which a client or third person has an interest, a lawyer shall promptly notify the client or third person. Except as stated in this Rule or otherwise permitted by law or by agreement with the client, a lawyer shall promptly deliver to the client or third person any funds or other property that the client or third person is entitled to receive and, upon request by the client or third person, shall promptly render a full accounting regarding such property.

MD. LAWYERS' RULES OF PROFESSIONAL CONDUCT Rule 1.15(b) (1995).

113. *Advance Fin.*, 337 Md. at 207-08, 652 A.2d at 666 (noting that, while the Rules do not impose civil liability, the "instant proceeding is not an action seeking directly to impose civil liability . . . but a claim by Advance for reimbursement by the Fund").

114. *Id.*

trates that a strong relationship exists between effective public policy and the application of the MLRPC.

c. Application of Fee-Splitting Rules in Other Jurisdictions.— Other jurisdictions have given effect to their corresponding ethical rules regarding referral fee provisions when assessing the enforceability of an agreement between lawyers. The following cases, which the *Bregman* court discussed, illustrate the methods and reasoning employed by other jurisdictions.

In *Dragelevich v. Kohn, Milstein, Cohen & Hausfeld*,¹¹⁵ a dispute arose between attorneys concerning a division of fees. J. Walter Dragelevich (Dragelevich) represented Tauro Brother Trucking Company, which wished to file an antitrust action against several railroads.¹¹⁶ Dragelevich contacted Jerry Cohen of Kohn, Milstein, Cohen & Hausfeld (Kohn, Milstein), who agreed to serve as lead counsel in the case.¹¹⁷ The agreement indicated that Kohn, Milstein would take the case on a contingent fee basis, with Kohn, Milstein receiving eighty percent of the fees, and Dragelevich receiving the remaining twenty percent.¹¹⁸ Affidavits submitted by both parties indicated that Kohn, Milstein spent substantially more time and resources on the case than Dragelevich.¹¹⁹ The court was faced with the question of “whether a fee-splitting agreement between attorneys is enforceable when the actual contribution of an attorney in the case differs substantially from the proportion of fees to which he would be entitled under the agreement.”¹²⁰ The court, without explanation, asserted that this question was governed by Disciplinary Rule 2-107(A) of the Ohio Code of Professional Responsibility.¹²¹ After surveying

115. 755 F. Supp. 189 (N.D. Ohio 1990).

116. *Id.* at 190.

117. *Id.* Dragelevich in turn would serve as local co-counsel in the case. *Id.*

118. *Id.* The agreement also indicated that if Dragelevich contributed more to the case than what was originally contemplated, the 20% would be modified accordingly. *Id.*

119. *Id.* at 191. According to the submitted affidavits, Kohn, Milstein “expended upwards of 5000 hours in that case, including more than 4000 hours of attorney time.” *Id.* In contrast, Dragelevich averred that he spent 134.9 hours on the case. *Id.*

120. *Id.*

121. *Id.* Disciplinary Rule 2-107(A) provides:

A lawyer shall not divide a fee for legal services with another lawyer who is not a partner or associate of his law firm or law office, unless:

(1) The client consents to employment of the other lawyer after a full disclosure that a division of fees will be made.

(2) The division is made in proportion to the services performed and responsibility assumed by each.

(3) The total fee of the lawyers does not clearly exceed reasonable compensation for all the legal services they rendered the client.

See id. (quoting OHIO CODE OF PROFESSIONAL RESPONSIBILITY DR 2-107(A) (1984)).

cases from other courts that have faced similar questions,¹²² the court concluded that it "would accept what appears to be the majority view, that DR 2-107(A) precludes enforcement of the agreement alleged in this case."¹²³ The court pointed to the undisputed fact that Dragelevich's time spent on the case amounted to three percent of the total attorney time spent on the case, a proportion that failed to meet the "plain language of the rule . . . that the division of fees among counsel must be 'made in proportion to the services performed and responsibility assumed by each.'"¹²⁴

Baer v. First Options of Chicago, Inc.,¹²⁵ a case cited with approval in *Bregman*, originated as a Title VII action and turned into a dispute between attorneys regarding a referral fee agreement.¹²⁶ The dispute arose when the referring attorney modified a valid fee-splitting agreement with the attorney representing the plaintiff in the Title VII suit, such that each attorney would be compensated for the hours he worked multiplied by his hourly rate.¹²⁷ The attorney representing the plaintiff argued that the modification voided the earlier agreement, and that the current arrangement need not conform to Rule 1.5 because it did not constitute a fee-splitting agreement.¹²⁸ The Seventh Circuit disagreed, holding that the new agreement fell within the meaning of a fee-splitting agreement under Rule 1.5 and was therefore subject to its requirements.¹²⁹ The court reasoned that Rule 1.5 was controlling in this case because the Illinois Supreme Court had determined that the Rules bind its state courts as a matter of law.¹³⁰ Because the modification of the fee-splitting agreement was never put in writing, in direct contravention to the writing requirement in 1.5(f), the Seventh Circuit held that the modification was invalid and unenforceable, and that the terms of the original agreement controlled the division of the fees.¹³¹

122. *See id.* at 192-93 (discussing cases from other jurisdictions concerning fee-splitting and the division of responsibility).

123. *Id.* at 193.

124. *Id.* at 193 & n.8.

125. 72 F.3d 1294 (7th Cir. 1995).

126. *Id.* at 1296.

127. *Id.* at 1296-97. The change was made after the attorneys realized that their original estimate of the award they would receive at settlement was high, and that the current prospect of recovery would adversely affect the attorney's firm. *Id.*

128. *Id.* at 1304.

129. *See id.* (reasoning that the substitute agreement on its face stated that it was an agreement to split fees).

130. *Id.* at 1302.

131. *Id.* at 1305.

In *Scolinos v. Kolts*,¹³² a California court held that a referral fee agreement between attorneys was unenforceable on public policy grounds based on violations of California's Rules of Professional Conduct governing fee agreements.¹³³ *Scolinos* involved a wrongful termination suit that settled for \$390,000, \$90,000 of which was paid to Kolts, the principal attorney.¹³⁴ Kolts received the case when the appellant, Scolinos, referred it to him upon an oral agreement that Kolts would pay Scolinos one-third of any fees recovered from the case.¹³⁵ The court held that as the agreement did not abide by the writing requirement of Rule 2-108, it was "unenforceable on public policy grounds."¹³⁶ The court reasoned that allowing the enforcement of an unethical fee agreement through court action when the attorney seeking enforcement would be subject to disciplinary proceedings would run contrary to the public policy that the Rules seek to protect.¹³⁷

In *In re Estate of Katchatag*,¹³⁸ the Supreme Court of Alaska affirmed a probate court's ruling that a fee-splitting agreement entered into by two lawyers was invalid.¹³⁹ Elena and Van Abel Katchatag originally contacted Leonard Kelley, an attorney, regarding a potential medical malpractice case on behalf of Elena.¹⁴⁰ Kelley then contacted another attorney specializing in this area, William Donohue, about assuming the role of co-counsel in the case.¹⁴¹ Prior to the start of litigation of the wrongful death claim, Donohue entered into a contingent fee agreement with Katchatag, brought in additional counsel, and received approval of the contingency agreement from a probate court.¹⁴² After prevailing in the medical malpractice wrongful death action, Donohue moved for approval of his costs and fees from the probate court, but subsequently requested a delay of this ruling pending any claims for costs and fees filed by Kelley, the original referring

132. 44 Cal. Rptr. 2d 31 (Ct. App. 1995).

133. *Id.* at 34.

134. *Id.* at 32.

135. *Id.*

136. *Id.* at 34. Rule 2-108 of the Rules of Professional Conduct of the State Bar of California requires that the "'client consent[] in writing to employment of the other person licensed to practice law after a full disclosure has been made in writing that a division of fees will be made and the terms of such division.'" See *id.* at 33 (quoting CAL. RULES OF PROFESSIONAL CONDUCT Rule 2-108 (1988)).

137. *Id.* at 34.

138. 907 P.2d 458 (Alaska 1995).

139. *Id.* at 459.

140. *Id.*

141. *Id.*

142. *Id.* at 460. The fee agreement between Donohue and Katchatag did not include the fee arrangement that, according to Kelley (the original referring attorney), he had made verbally between himself and Donohue. *Id.* at 459.

attorney.¹⁴³ Donohue argued that Kelley was not entitled to any fee because the latter had not entered into a written agreement, as required by Alaska Bar Rule 35(e),¹⁴⁴ and because Kelley had done little work on the case.¹⁴⁵ The Supreme Court of Alaska held that the dispute was governed by the Bar Rules because they operated with the force of law.¹⁴⁶ Because Kelley failed to secure the fee agreement in writing, the court held there was no valid enforceable fee sharing agreement because "Bar Rule 35(e)(2) was not satisfied."¹⁴⁷

d. Application of Ethics Rules in Three Legal Malpractice Cases.— One area of law particularly relevant to the strength of the MLRPC outside of disciplinary proceedings is legal malpractice. The following three cases, two from jurisdictions outside of Maryland, are illustrative of the possible impact of *Bregman*.

In Maryland, the Scope Section of the MLRPC states that a violation of a rule does "not give rise to a cause of action."¹⁴⁸ In *Hooper v. Gill*,¹⁴⁹ the Court of Special Appeals observed that, although the question was not resolved as to whether a violation of a provision in the Code of Professional Responsibility, the predecessor to MLRPC, provided a basis for a civil action, the Rules contain a statement that they "do 'not give rise to a cause of action.'"¹⁵⁰ The *Hooper* court ruled, however, that because the plaintiff never proved damages, the court did not have to resolve the question of whether the Code of Professional Responsibility furnished a basis for a civil suit.¹⁵¹ Since *Hooper*, no Maryland court has resolved this issue.

143. *Id.* at 460.

144. *Id.* Rule 35(e) states, in pertinent part:

(e) Fee Divisions Between Attorneys. A division of fees between attorneys who are not in the same firm may be made only if:

(1) the division is in proportion to the services performed by each attorney or, by written agreement with the client, each attorney assumes joint responsibility for the representation;

(2) the client is advised of and does not object to the participation of all attorneys involved; and

(3) the total fee is reasonable.

See *id.* at 463-64 (quoting ALASKA BAR RULES 35(e)).

145. *Id.* at 460-61.

146. *Id.* at 463 (citing *Citizens Coalition for Tort Reform, Inc. v. McAplene*, 810 P.2d 162 (Alaska 1991)).

147. *Id.* at 464.

148. MD. LAWYERS' RULES OF PROFESSIONAL CONDUCT Scope Note (1989).

149. 79 Md. App. 437, 557 A.2d 1349 (1989).

150. *Id.* at 442, 557 A.2d at 1351 (quoting MD. LAWYERS' RULES OF PROFESSIONAL CONDUCT Scope Note (1989)).

151. *Id.* at 444, 557 A.2d at 1352-53.

Other jurisdictions have confronted the question in different ways. In *Lipton v. Boesky*,¹⁵² Luce Lipton sued her former attorney, Boesky, for malpractice arising out of Boesky's representation of her in a construction contract dispute.¹⁵³ On appeal to the Court of Appeals of Michigan, Lipton argued that Boesky's multiple violations of Michigan's Code of Professional Responsibility gave rise to a cause of action for malpractice.¹⁵⁴ The court analyzed that argument by analogizing a violation of the Code of Professional Responsibility to a situation in which an act implicates both criminal law and tort law.¹⁵⁵ In this situation, "[t]he same wrongful act may be offensive to the private individual as well as to the public generally."¹⁵⁶ The court reasoned that the Code of Professional Responsibility constitutes a general standard of behavior expected by the public from lawyers in that state, so that it would be unfair to prohibit a specific client from relying on those standards in a professional relationship with her attorney.¹⁵⁷ Thus, the court concluded that, "as with statutes, a violation of the Code is rebuttable evidence of malpractice."¹⁵⁸

In *Fishman v. Brooks*,¹⁵⁹ a legal malpractice case arising out of a car-bicycle accident, the client obtained a jury verdict finding that his attorney's negligent representation of him resulted in a settlement award for less than his claim was worth.¹⁶⁰ In affirming the relevance of testimony concerning ethical standards, the court concluded that, although a violation of a disciplinary rule was not an "actionable breach" in and of itself, "[a]s with statutes and regulations, however, if a plaintiff can demonstrate that a disciplinary rule was intended to protect one in his position, a violation of that rule may be some evidence of the attorney's negligence."¹⁶¹

152. 313 N.W.2d 163 (Mich. Ct. App. 1981).

153. See *id.* at 164 (reviewing the facts giving rise to the case).

154. *Id.* at 164-65. The alleged legal malpractice set forth in the plaintiff's complaint included: (1) failure to oppose a motion for summary judgment in open court, a violation of DR-2110; (2) allowance of a default judgment in the same action, a violation of DR-6101; (3) failure to file a breach of contract suit while representing to his clients that he was in the process of doing so, a violation of DR-7-101, DR-6-101(A)(3), and DR-1-102(A)(4); and (4) misrepresentation to clients over the terms of an agreement, a violation of DR-6-101 and DR-1-102(A)(4). *Id.*

155. *Id.* at 166.

156. *Id.*

157. *Id.* at 166-67.

158. *Id.* at 167 (citing *Zeni v. Anderson*, 243 N.W.2d 270 (Mich. 1976)).

159. 487 N.E.2d 1377 (Mass. 1986).

160. *Id.* at 1378.

161. *Id.* at 1381.

3. *The Court's Reasoning.*—In *Post v. Bregman*, the Court of Appeals ruled that a violation of Rule 1.5(e) of the MLRPC may be used as a defense to a breach of contract in proceedings outside of the disciplinary context.¹⁶² Prior to analyzing the question whether a violation of the MLRPC could render a fee agreement between lawyers unenforceable, the court considered two other issues. First, the court declined to determine whether Bregman violated Rule 1.5(e).¹⁶³ Second, the court ruled that the issues involved in the declaratory judgment motions were clearly different from those raised in the summary judgment action,¹⁶⁴ and that the circuit court should have entered its judgment in accordance with the general rule that requires a court to rule on a declaratory judgment even when the judgment concerns an alternative claim in the same action pending between the parties.¹⁶⁵

a. *Effect of MLRPC 1.5(e).*—Turning to the central question of the effect of MLRPC 1.5(e), the court began its analysis by noting that both the circuit court and the Court of Special Appeals, as well as Post himself, had characterized Post's arguments regarding Rule 1.5(e)'s effect on the fee agreement in distinct ways that reflected two views of the Rules.¹⁶⁶ The court characterized Post's argument in the circuit court proceedings as a defense to a breach of contract claim.¹⁶⁷ Post was asserting that, because the MLRPC was a statement of public policy, any violation of Rule 1.5(e) rendered the fee agreement unen-

162. *Bregman*, 349 Md. at 168, 707 A.2d at 825.

163. *Id.* at 158-59, 707 A.2d at 814. The court based its decision on the general rule that, on an appeal from a summary judgment that is potentially reversible on the grounds relied on by the trial court, an appellate court cannot sustain the summary judgment on other grounds, if the trial court had the option to deny the summary judgment on those other grounds. *Id.* (citing *Geisz v. Greater Baltimore Med. Ctr.*, 313 Md. 301, 314 n.5, 545 A.2d 658, 664 n.5 (1988)). Therefore, the question of *Bregman's* violation was obviated by the Court of Special Appeal's conclusion that such a violation could not be used as a defense to the enforcement of the agreement. *Id.*; see also *Post v. Bregman*, 112 Md. App. 738, 762, 686 A.2d 665, 676 (1996) (finding that to interpret whether the contract violates the MLRPC would "augment . . . extra-disciplinary consequences of violating" the MLRPC (quoting MD. LAWYERS' RULES OF PROFESSIONAL CONDUCT Scope Note (1996))), *rev'd*, 349 Md. 142, 707 A.2d 806 (1998).

164. The declaratory actions were seeking an explicit ruling as to the parties' rights under Rule 1.5(e), while the summary judgment motion was based on the breach of contract claim. *Bregman*, 349 Md. at 160, 707 A.2d at 815.

165. *Id.*, 707 A.2d at 814-15. Both parties sought specific determinations on whether the fee agreement was governed by MLRPC 1.5(e), whether or not there was a violation of that rule, and the effect, if any, of such a violation on the fee agreement. *Id.*, 707 A.2d at 815. The court concluded that on remand, the circuit court must declare the rights of the parties. *Id.* at 161, 707 A.2d at 815.

166. *Id.*

167. *Id.*

forceable as against that public policy.¹⁶⁸ The court viewed the Court of Special Appeals's characterization of Post's argument as an assertion that Rule 1.5(e) was implicitly incorporated into the agreement, so that any infraction of the Rule would operate as a violation of the contract itself.¹⁶⁹

The court characterized these two arguments as components of the larger question of whether the Rules constitute public policy having the force of law.¹⁷⁰ Addressing this question, the court recognized the disparity in the application of similar disciplinary rules among different jurisdictions,¹⁷¹ and located the cause of this disparity in the origins of the disciplinary rules.¹⁷² In jurisdictions where the Rules were promulgated by bar associations and then "enacted" by lower court systems, courts have held that these rules do not have the force of law, but instead constitute internal, self-imposed ethical regulations.¹⁷³ In contrast, the court noted that in Maryland, the Rules were adopted by the highest court in the state under its constitutionally-endowed power to regulate the bar and its practice of law.¹⁷⁴ The court observed that the Rules "serve to regulate virtually every aspect of the practice of law," a profession whose "integrity . . . is vital to nearly every other institution and endeavor of our society."¹⁷⁵ In light of the extensive nature of the regulations, and the fundamental importance of the legal profession in society, the court held that the

168. *Id.*

169. *Id.*

170. *Id.* at 162, 707 A.2d at 815.

171. *See id.*, 707 A.2d at 815-16 (discussing cases from Maine, Michigan, New York, and Utah as jurisdictions that treat the Rules as internal regulations of the bar).

172. *See id.*, 707 A.2d at 816 (distinguishing the state Bar Association from the judicial system as distinct bodies that promulgated the rules of conduct for a particular state).

173. *Id.* at 162-63, 707 A.2d at 816. The court cited decisions from a number of jurisdictions. *See In re Dineen*, 380 A.2d 603, 604 (Me. 1977) (finding that, because the disciplinary rules were adopted by the Maine Bar Association and not by the court, "the code of professional responsibility and the disciplinary rules do not have the force of positive law"); *People v. Green*, 274 N.W.2d 448, 449, 454 (Mich. 1979) (refusing defendant's request to suppress evidence in light of the assistant prosecutor's violation of DR-7-104(A)(1) on the ground that the provisions in the Code of Professional Responsibility are merely "self-imposed internal regulations prescribing the standards of conduct for members of the bar"); *State v. Ford*, 793 P.2d 397, 400 (Utah Ct. App. 1990) (declining to overturn the murder conviction of the defendant merely on the basis of a violation of Rule 4.2 of the Utah Rules of Professional Conduct, and quoting language from *Green*, 274 N.W.2d at 454, that the Rules are only "self-imposed internal regulations").

174. *See Bregman*, 349 Md. at 162-63, 707 A.2d at 816 (holding that the exertion of this power fell well within the constitutional realm of the judiciary's power to regulate the affairs and conduct of lawyers practicing in the state (citing *Attorney Gen. v. Waldron*, 289 Md. 683, 696-97, 426 A.2d 929, 936-37 (1981))).

175. *Id.* at 163, 707 A.2d at 816.

Rules "constitute an expression of public policy having the force of law."¹⁷⁶

Having determined that the Rules have the force of law and constitute public policy, the court turned to the narrower issue of their enforceability outside of disciplinary proceedings, specifically whether Rule 1.5(e) governed the fee agreement entered into by Post and Bregman.¹⁷⁷ The court noted that in Maryland, as well as a majority of jurisdictions, courts have already recognized the effect of the Rules outside of the context of disciplinary proceedings.¹⁷⁸ The court cited a number of Maryland cases in which it had applied various Rules outside this context, from determining the fiduciary status of a lawyer to allowing a jury to hear evidence of a Code violation in order to consider whether the lawyer had the requisite criminal intent when he received stolen funds.¹⁷⁹ In addition, the court approved of cases from five different jurisdictions where courts had applied their version of the Rules to fee agreements between attorneys.¹⁸⁰ Having dis-

176. *Id.* As for jurisdictions with opposing views of the authority and role of their ethical codes, the court reasoned that such rulings were simply irrelevant to its analysis. *Id.* at 164, 707 A.2d at 816. The court noted, however, that a number of jurisdictions shared identical opinions regarding the power of their respective Codes. *See* Citizens Coalition for Tort Reform, Inc. v. McAlpine, 810 P.2d 162, 170-71 (Alaska 1991) (holding that a citizen group's proposal to alter rules regarding contingent fees already addressed by the Alaska Bar Rules and the Code of Professional Responsibility represented an impermissible interference with the court's inherent authority to prescribe rules of court); *In re Vrdolyak*, 560 N.E.2d 840, 845 (Ill. 1990) (per curiam) (interpreting the state's ethical code as "an exercise of this court's inherent power over the bar and as rules of court . . . operat[ing] with the force of law"); *Succession of Cloud*, 530 So. 2d 1146, 1150 (La. 1988) (holding that "[t]he standards in the Code of Professional Responsibility which govern the conduct of attorneys have the force and effect of substantive law," so that a contract between an attorney and her client in violation of disciplinary rules must be invalidated "in order to preserve the integrity of [the court's] inherent judicial power" (citations omitted)).

177. *Bregman*, 347 Md. at 164, 707 A.2d at 817.

178. *Id.*

179. *See id.* at 164-65, 707 A.2d at 817 (citing *Advance Fin. Co. v. Trustees*, 337 Md. 195, 205-08, 652 A.2d 660, 665-66 (1995) (using Rule 1.15(b) to determine the fiduciary status of an attorney in assessing liability); *Harris v. Baltimore Sun Co.*, 330 Md. 595, 605-10, 625 A.2d 941, 945-48 (1993) (applying Rule 1.6 (Confidentiality of Information) to determine a public defender's obligations under the Public Information Act to release information to a newspaper regarding his client); *Prahinski v. Prahinski*, 321 Md. 227, 241, 582 A.2d 784, 790-91 (1990) (applying Rules 5.4(b), (d) to determine that the goodwill of a lawyer's practice is not marital property); *Harris v. David S. Harris, P.A.*, 310 Md. 310, 320, 529 A.2d 356, 361 (1987) (holding that Rule 3.7 is the appropriate standard in determining whether the attorney in question ought to be disqualified); *Cardin v. State*, 73 Md. App. 200, 214-15, 533 A.2d 928, 935 (1987) (holding that a jury could consider evidence of a violation of a provision of the Disciplinary Code in determining whether the attorney in question had criminal intent when he received stolen funds)).

180. *Id.* at 166, 707 A.2d at 817-18 (citing *Baer v. First Options of Chicago, Inc.* 72 F.3d 1294, 1304 (7th Cir. 1995) (applying Illinois law and holding that a fee agreement was unenforceable because it did not comply with the writing requirement of Illinois' counter-

cussed these cases, the court "adopt[ed] the premise emanating from those cases that MLRPC 1.5(e) does constitute a supervening statement of public policy to which fee-sharing agreements by lawyers are subject," and that the Rule is enforceable outside of the disciplinary context.¹⁸¹

The court was quick to point out that its decision was not creating a *per se* defense against the enforcement of an otherwise valid fee agreement merely based on technical, insubstantial infractions of the Rule.¹⁸² In order to guard against unfair abuse, the court constructed a set of required guidelines for courts to follow when presented with a defense to the enforceability of a fee-sharing agreement based on a violation of Rule 1.5(e).¹⁸³ If a court does find a violation of the Rule, it must then consider:

(1) the nature of the alleged violation, (2) how the violation came about, (3) the extent to which the parties acted in good faith, (4) whether the lawyer raising the defense is at least equally culpable as the lawyer against whom the defense is raised and whether the defense is being raised simply to escape an otherwise valid contractual obligation, (5) whether the violation has some particular public importance, such that there is a public interest in not enforcing the agreement, (6) whether the client, in particular, would be harmed by enforcing the agreement, and, in that regard, if the agreement is found to be so violative of the Rule as to be unenforceable, whether all or any part of the disputed amount should be returned to the client on the ground that, to that

part to Rule 1.5(e)); *In re P & E Boat Rentals, Inc.*, 928 F.2d 662 (5th Cir. 1991) (applying Louisiana law, and invalidating referral fee agreement between lawyers on the ground that to enforce the agreement would contravene the Louisiana Code of Professional Conduct); *Dragelevich v. Kohn, Milstein, Cohen & Hausfeld*, 755 F. Supp. 189, 194 (N.D. Ohio 1990) (applying Ohio law and holding a fee-sharing agreement invalid because there was evidence that the attorney demanding 20% of the fee did little work in the case); *Matter of Estate of Katchatag*, 907 P.2d 458, 464 (Alaska 1995) (refusing to enforce referral fee agreement between attorneys because the client was unaware of the agreement, which violated ethical requirements); *Scolinos v. Kolts*, 44 Cal. Rptr. 2d 31, 34 (Ct. App. 1995) (holding a fee agreement invalid on the grounds that the client did not approve of the agreement in writing in contravention of California's version of Rule 1.5(e)); *Belli v. Shaw*, 657 P.2d 315, 319 (Wash. 1983) (declining to enforce fee agreement that violated Washington state's counterpart to Rule 1.5(e)).

181. *Bregman*, 349 Md. at 168, 707 A.2d at 818.

182. *Id.*, 707 A.2d at 819. The court was concerned with potential misuse of the defense, asserting that its application would be inappropriate if it would be "manifestly unfair and inequitable not to enforce the agreement." *Id.*

183. *Id.* at 169-70, 707 A.2d at 819.

extent, the fee is unreasonable, and (7) any other relevant considerations.¹⁸⁴

Moreover, the court emphasized that whether a party invokes a violation of Rule 1.5(e) as a defense or argues that the Rule should be incorporated into the contract, courts must keep in mind that the defense is equitable in nature, and that principles of fairness should apply.¹⁸⁵ The court remanded the case to the Circuit Court for Montgomery County with instructions to enter a decision in accordance with its opinion.¹⁸⁶

Judge Chasanow, joined by Judge Eldridge, filed a dissenting opinion, in which he criticized the majority's equitable standard, arguing that this test is applied in no other jurisdiction, and that it was "vague, amorphous . . . and at best problematic."¹⁸⁷ Judge Chasanow asserted that the trial court properly granted summary judgement by rejecting Post's application of Rule 1.5.¹⁸⁸ He also claimed that the standard of reasonableness of a contingent fee contract should be based at the time the contract was entered into, not after the fact.¹⁸⁹

4. *Analysis.*—In *Post v. Bregman*, the Court of Appeals ruled that an attorney may invoke a violation of Rule 1.5(e) of the MLRPC outside the disciplinary context as a defense to a breach of contract claim, in order to render that contract unenforceable.¹⁹⁰ Given the judiciary's consistent application of the MLRPC outside the realm of disciplinary proceedings, the court's characterization of the Rules as public policy having the force of law was a correct assessment.¹⁹¹ The decision's clearest and most immediate impact is on referral fee agreements between attorneys. A recent case, *Son v. Margolius, Mallios, Davis, Rider & Tomar*,¹⁹² is illustrative of the approach the court may take when faced with a violation of a MLRPC provision in a contract dispute. While an expansion of the MLRPC to the realm of referral fee agreements is most notable, the strength of the court's holding that the Rules constitute an expression of public policy may have opened

184. *Id.* (footnote omitted).

185. *Id.* at 170, 707 A.2d at 819.

186. *Id.*, 707 A.2d at 819-20.

187. *Id.* at 187, 707 A.2d at 828 (Chasanow, J., dissenting).

188. *Id.* at 178-79, 707 A.2d at 823-24.

189. *Id.* at 180-81, 707 A.2d at 825.

190. *Bregman*, 349 Md. at 168, 707 A.2d at 818.

191. See *supra* notes 75-114 (detailing Maryland cases in which the courts have given effect to the MLRPC).

192. 349 Md. 441, 709 A.2d 112 (1998).

the door for future application of the Rules in situations other than referral fee disputes.

a. The Court's Predictable Expansion of the MLRPC.—The *Bregman* court pointed to a line of Maryland cases in which courts gave varying effects to the MLRPC beyond the realm of disciplinary agreements.¹⁹³ Although the particular applications of the MLRPC in these cases differ greatly, each case implicitly recognized the strength and relevance of the MLRPC outside the context of disciplinary proceedings.¹⁹⁴ The MLRPC are essentially a codification of the standard of behavior expected of all members of the bar. Whenever an issue or controversy arises that implicates any provision of the MLRPC, a court is in a position where declining to apply a rule would undermine not just the rule in question, but the very existence of the MLRPC as a whole and indeed the power of the courts to regulate the bar. The *Bregman* court recognized this argument and cited cases in which courts held similar positions when it held that Rule 1.5(e) and the MLRPC as a whole is a statement of public policy enforceable outside of the disciplinary context.¹⁹⁵

b. Effect on Referral Fee Agreements.—The court made it clear that in order to succeed with the defense of a violation of the MLRPC, the violation must be a substantial one.¹⁹⁶ The cases upon which the court relied in order to recognize this defense demonstrate the various kinds of violations that may render a contract unenforceable.¹⁹⁷ For example, Rule 1.5(e) mandates that the client be advised of and

193. *Bregman*, 349 Md. at 164-65, 707 A.2d 817; see also *supra* notes 75-114 (discussing cases in which courts have given effect to the MLRPC).

194. See *supra* notes 75-114 (discussing the weight given to the MLRPC in situations removed from disciplinary proceedings).

195. *Bregman*, 349 Md. at 168, 707 A.2d at 818. The *Bregman* court pointed out the obviously bizarre outcome that would occur if it enforced an agreement “when that very enforcement, or perhaps even the existence of the agreement sought to be enforced, would render the lawyer subject to discipline.” *Id.* (citing *Scolinos v. Kolts*, 44 Cal. Rptr. 2d 31 (Ct. App. 1995)); see also *Scolinos*, 44 Cal. Rptr. 2d at 34 (noting that “[i]t would be absurd if an attorney were allowed to enforce an unethical fee agreement through court action, even though the attorney potentially is subject to professional discipline for entering into the agreement.”).

196. See *Bregman*, 349 Md. at 169, 707 A.2d at 819 (noting that an otherwise valid fee-sharing agreement should not be struck down “merely because of a minor technical deficiency with respect to the professional rules” (internal quotation marks omitted) (quoting *Christensen v. Eggen*, 562 N.W.2d 806, 811 (Minn. Ct. App. 1997))).

197. See *id.* at 166-68, 707 A.2d at 817-18 (surveying several cases in which professional conduct violations rendered a fee-sharing contract invalid); see also *supra* notes 115-147 and accompanying text (describing three instances in which courts from other jurisdictions applied their corresponding fee provisions).

have no objections to the participation of all of the attorneys in her case.¹⁹⁸ With respect to this requirement,¹⁹⁹ the court cited *In re Estate of Katchatag*,²⁰⁰ which invalidated a fee agreement where the attorneys neither advised the client of an existing referral fee nor disclosed the identity of the attorneys involved.²⁰¹ This citation suggests that the Court of Appeals also would refuse to enforce a fee sharing agreement under these circumstances. This nonenforcement would be sensible, because the client's awareness of and consent to a division of fees is a fundamental and not merely technical requirement of Rule 1.5(3).

Other cases relied on by the court indicate that it will permit a party to invoke the defense if there is evidence that lawyers did too little work to merit the established percentage of a referral fee.²⁰² Rule 1.5(e) requires that the fees must either be divided in proportion to the work performed by all parties, or that each attorney agree to assume joint responsibility in the case.²⁰³ The court cited *Dragelevich v. Kohn, Milstein, Cohen & Hausfeld*,²⁰⁴ in which a United States District Court applied Ohio law to render a fee agreement unenforceable on the ground that the party demanding the referral fee did not do the work in proportion to his demand.²⁰⁵ Faced with a similar violation of MLRPC 1.5(e), courts in Maryland may likewise apply the *Bregman* rule to invalidate an otherwise valid fee-splitting agreement. Such an application would be reasonable given the plain language of MLRPC 1.5(e) and the interests it seeks to protect. Those interests include protecting the client from abusive fee agreements and ensuring that lawyers receive fees in proportion to the work and responsibility they assume in the case.

It is important to note that the *Bregman* court emphasized that mere technical violations of the MLRPC should not warrant their use

198. See *supra* note 2 (setting forth the text of Rule 1.5(e)).

199. See *Bregman*, 349 Md. at 167, 707 A.2d at 818.

200. 907 P.2d 458 (Alaska 1995); see *supra* notes 138-147 (discussing this case).

201. *In re Estate of Katchatag*, 907 P.2d at 464. The *Bregman* court also cited *Belli v. Shaw*, 657 P.2d 315 (Wash. 1983), which refused to enforce a referral fee agreement because the client had not approved it and because the referring attorney had done so little work on the case.

202. See *Bregman*, 349 Md. at 167, 707 A.2d at 818 (citing to *In Matter of P&E Boat Rentals, Inc.*, 28 F.2d 662 (5th Cir. 1991), and *Belli v. Shaw*, 657 P.2d 315 (Wash. 1983), cases in which courts refused to enforce fee-splitting agreements because the referring attorney did not do a significant amount of the work).

203. See MD. LAWYERS' RULES OF PROFESSIONAL CONDUCT Rule 1.5(e) (1998) (stating that division of fees may be made only if "(1) the division is in *proportion to the services performed* by each lawyer or, by written agreement with the client, each lawyer assumes joint responsibility for the representation" (emphasis added)).

204. 755 F. Supp. 189 (N.D. Ohio 1990).

205. *Id.* at 194; see *supra* notes 115-124 (discussing the facts of this case).

as a breach of contract defense.²⁰⁶ Consider this example, which illustrates the court's concerns. Attorney A refers his client to Attorney B and enters into a valid fee-splitting agreement with Attorney B. Attorney B later desires to terminate the fee-splitting agreement with Attorney A so that he can retain all of the fees generated from the case. Knowing that a court will not enforce an invalid fee agreement, Attorney B acts so as to render the fee agreement invalid by modifying the agreement without putting it in writing. This violation, however, is only minor or technical. In such a scenario, the *Bregman* decision indicates that the Court of Appeals would recognize the insubstantial nature of the violation and would uphold the fee agreement, on the ground that it would be inequitable for Attorney B to retain all generated fees.²⁰⁷

c. *Application of Bregman to Other Fee Agreements.*—In *Son v. Margolius, Mallios, Davis, Rider & Tomar*,²⁰⁸ the Court of Appeals, relying on its ruling in *Bregman*, considered whether an arrangement between an attorney and a third party concerning a consulting agreement involving the attorney's client violated MLRPC 5.4²⁰⁹ or MLRPC 7.2,²¹⁰ and was therefore void on public policy grounds.²¹¹ The court reversed the Court of Special Appeals,²¹² which had held that a violation of MLRPC 5.4 or 7.2 was not a basis for holding the contract unenforceable.²¹³

206. *Bregman*, 349 Md. at 168-69, 707 A.2d at 818-19.

207. See *id.* at 169, 707 A.2d at 819 (emphasizing that minor technical violations of the MLRPC may not render the otherwise valid fee-sharing agreement invalid); see also *id.* at 181-82, 707 A.2d at 825 (Chasanow, J., dissenting) (creating a hypothetical scenario to argue that the focus of any examination of a contract's ethical consequence should begin at the point when the contract is entered into, rather than "through hindsight based on fortuitous events that occurred later").

208. 349 Md. 441, 709 A.2d 112 (1998).

209. MLRPC 5.4 provides, in pertinent part, that "[a] lawyer or law firm shall not share legal fees with a nonlawyer," with certain exceptions. MD. LAWYERS' RULES OF PROFESSIONAL CONDUCT Rule 5.4 (1998).

210. MLRPC 7.2(c) provides in pertinent part that:

A lawyer shall not give anything of value to a person for recommending the lawyer's services, except that a lawyer may pay the reasonable cost of advertising or written communication permitted by this Rule and may pay the usual charges of a not-for-profit lawyer referral service or other legal service organization.

MD. LAWYERS' RULES OF PROFESSIONAL CONDUCT Rule 7.2(c) (1998).

211. *Son*, 349 Md. at 461, 709 A.2d at 121-22.

212. *Id.* at 461-62, 709 A.2d at 122. The court emphasized its holding in *Bregman* that the MLRPC was an embodiment of public policy. *Id.*

213. *Son v. Margolius, Mallios, Davis, Rider & Tomar*, 114 Md. App. 190, 219, 689 A.2d 645, 659 (1997), *rev'd*, 349 Md. 441, 709 A.2d 112 (1998).

The *Son* case arose out of a crippling accident suffered by Danny Son (Son) on August 2, 1992.²¹⁴ Son's then-wife, Tae Yon So (Ms. Son) retained Gary A. Stein (Stein), of the firm Margolius, Mallios, Davis, Rider & Tomar (Margolius), to represent the Son family as it sought compensation for the accident.²¹⁵ The issue before the court involved the way in which the settlement proceeds were distributed between Margolius, and a third party, Jennifer Park.²¹⁶

According to Ms. Son, she contacted Park within a short time following the accident in order to receive her assistance in finding appropriate counsel.²¹⁷ The evidence indicates that on August 12, Ms. Son, Park, and Stein met, and Ms. Son signed three agreements.²¹⁸ The first agreement, entitled "Employment Contract" was between Ms. Son and Park and promised to pay Park ten percent of any recovery in consideration for the help that she would provide the Sons in the course of any proceedings.²¹⁹ The other two contracts were retainer agreements, signed only by Ms. Son, to employ the Margolius firm as counsel to pursue claims arising out of the accident.²²⁰

214. *Son*, 349 Md. at 443, 709 A.2d at 113. The accident occurred as Son was attempting to change a flat tire on the shoulder of a highway. *Id.* Son was struck by a tractor-trailer, which caused him to be comatose for several weeks and rendered him quadriplegic. *Id.*

215. *Id.* Stein eventually initiated litigation proceedings and later negotiated a settlement in the sum of \$4,850,000 for the Son family. *Id.*

216. *Id.* The evidence indicated that the settlement award to Margolius should have been \$1,382,250, equal to 28.5% of the settlement. *Id.* However, the firm only kept \$1,139,750, equal to 23.5% of the award. *Id.* The remaining 5% of the fee went to Park, who received \$242,000 from the firm as a part of an alleged consulting agreement. *Id.* At the time of the accident, Park was widely known in the Korean community as one who used her English and Korean language skills to assist Koreans facing various problems. *Id.* at 447-48, 709 A.2d at 115. Park was also known personally by the Son family because they had employed her as their bookkeeper for two months in 1987. *Id.* at 448, 709 A.2d at 115. Park reported that for 15 years, she had been assisting Koreans in a variety of tasks, including locating counsel. *Id.*

217. *Id.* Ms. Son testified that she was aware that Park had assisted other Koreans in finding representation. *Id.* The day after receiving the call from Ms. Son, Park arrived at the hospital to discuss the issue of counsel with the Son family. *Id.* Park brought a list of three attorneys to the hospital, of which Stein was the first on the list, and told the Son family that she would charge them a fee of 10%, notwithstanding attorney's fees, of any recovery the Son family received. *Id.*

218. *Id.* at 449, 709 A.2d at 115-16.

219. *Id.* The 10% award was being given to Park to compensate her for being the "spokesperson and consultant for both of us [Mr. and Mrs. Son] so that to the best of her abilities, she can cooperate with both of us and the attorney we select." *Id.* The agreement further stated that Park would "prepare for any and all questions relative to the hospital and the law suit, and respond to the attorney and others on behalf of me and my husband upon consultation with us." *Id.* The agreement was written in Korean. *Id.* at 449, 709 A.2d at 115.

220. *Id.*, 709 A.2d at 116. The retainer agreements were identical, except the compensation to be awarded to the Margolius firm varied between the two versions. *Id.* One version

Although Stein testified that he was not aware of the agreement between Park and Son, the court found that he became aware of it in November 1992 when he signed another agreement to help implement a new arrangement entered into between Park and Son.²²¹ This new agreement clarified Park's duties to the Son family and modified the fee awarded to Park.²²² On December 3, 1992, two new retainer agreements were entered into between Son and Margolius.²²³ Like the previous retainer agreements, the only discrepancy between the two agreements was the fees.²²⁴ One year later, the case was settled for \$4,850,000.²²⁵ Son asserted that he never authorized payments to be made to Park, and he filed suit in the Circuit Court for Montgomery County against Stein, Margolius, and Park, seeking compensation for the \$242,500 remitted to Park, and the \$1,139,750 given to

of the retainer agreement stated that the fee would be "equal to 33 1/3 % (or 40% if case is tried) percent [sic] (33 1/3-40%) of the total amount of any settlement or judgment obtained in the case." *Id.* The other version stated that the fee would be "equal to 30% (or 35% if case is tried) percent [sic] (33 1/3-40%) of the total amount of any settlement or judgment obtained in the case." *Id.* at 449-50, 709 A.2d at 116.

221. *Id.* at 450, 709 A.2d at 116. On September 20, 1992, prior to the signing of the formation of the new employment agreement with Park, Park visited the hospital with a General Power of Attorney for Mr. Son to sign. *Id.* at 451, 709 A.2d at 116. Although, as the court noted, Mr. Son's condition was unclear, the form was signed by him, thereby appointing his wife "as his attorney-in-fact with general authority, among other things, to enter into all manner of contracts, prosecute suits, and 'take all steps and remedies necessary and proper for the conduct and management of [his] business affairs. . . ." *Id.* at 451, 709 A.2d at 116-17.

222. *Id.* at 451-52, 709 A.2d at 117. The agreement indicated that:

the Sons were willing "to assign to Ms. Park a nominal portion of six and one-half percent (6.5%) of any recovery they may receive from any source as result of their claims" and Ms. Park was willing "to provide her extensive consulting services to Clients in return for an assignment of said 6.5% of any recovery obtained, *unless the case is settled prior to trial in which case the consultant's fee is 5%.*

Id. at 452, 709 A.2d at 117. The consulting services contemplated in the agreement consisted of:

advocacy and negotiation with health care providers and community resources to assist clients in their day-to-day activities during the pending litigation, investigation services, research, paralegal support to the attorney representing Clients in their claim, acting as a liaison between Clients' attorney and the Korean community and other support services to Clients and their attorney as may be required from time to time.

Id.

223. *Id.* at 454, 709 A.2d at 118.

224. *Id.* The first retainer agreement awarded the Margolius firm with "28.5% of any settlement and 33 1/3% of any judgment obtained." *Id.* The second agreement provided for "23.5% of any settlement and 26.83% of any judgment." *Id.*

225. *Id.* at 455, 709 A.2d at 118. The Margolius firm paid itself \$1,139,750, which represented only 23.5% of the total fee. *Id.*, 709 A.2d at 119. The day after receiving its fee, the Margolius firm delivered a check to Park for \$242,500. *Id.*

Margolius.²²⁶ Son filed five counts in all; the first, his chief complaint, was that Park's referral fee constituted a violation of Maryland's Barratry Law.²²⁷ The remaining counts "charged a variety of torts, all based principally on the asserted concealment from Son of the allegedly illegal agreement."²²⁸ The Court of Appeals granted certiorari to consider two questions: the narrow barratry issue; and, in light of its recent holding in *Bregman*, "whether agreements entered into by lawyers that were in contravention of applicable MLRPC rules could be declared void as against public policy."²²⁹

Having decided in *Bregman* that Rule 1.5(e) and the MLRPC have the force of law and constitute public policy, the court held that Rule 5.4 and 7.2 deserved similar treatment. The court therefore conducted a *Bregman* analysis.²³⁰ Considering all of the evidence in the record, the court concluded that a question of material fact still existed, and that it would be necessary for the circuit court to "(1) make appropriate findings of fact from the disputed evidence, and (2) depending upon those findings, consider the factors mentioned in *Post v. Bregman*."²³¹ In remanding the case to the circuit court, the Court of Appeals further held that if the circuit court finds a violation of MLRPC 5.4 or 7.2, the attorney should be required to refund a portion of the fees accrued.²³² This ruling has arguably created a cause of action for Son because it essentially states that Son is due some refund if the lower court concludes that a violation of the rule has occurred.²³³ This is a clear extension of the *Bregman* holding, as well as an arguable contravention of the Scope's proscription against using violations of the MLRPC as a basis for civil liability.²³⁴

226. *Id.* at 443-44, 709 A.2d at 113.

227. *Id.* at 444, 709 A.2d at 113; see MD. CODE ANN., BUS. OCC. & PROF. § 10-604(a)(1) (1995) ("Without an existing relationship or interest in an issue: a person may not, for personal gain, solicit another person to sue or to retain a lawyer to represent the other person in a lawsuit . . .").

228. *Margolius*, 349 Md. at 444, 709 A.2d at 113. The parties filed cross-motions for summary judgment, and the Circuit Court granted the defendant's motion, giving no reason. *Id.*

229. *Id.* at 446, 709 A.2d at 114. The Court of Appeals first examined the question of barratry, affirming the lower court's dismissal of that charge. *Id.* at 456-61, 709 A.2d at 119 (reasoning that the barratry law bars lawyers from soliciting clients, but that in this case Mr. Stein did not solicit Son because Park referred Son to Mr. Stein).

230. See *id.* at 461-65, 709 A.2d at 122-23 (applying the *Bregman* factors, such as "the nature of the violation" and "how it came about" in order to determine whether violation of the MLRPC warranted holding the agreement unenforceable).

231. *Id.* at 465, 709 A.2d at 123.

232. *Id.*, 709 A.2d at 123-24.

233. *Id.* at 468, 709 A.2d at 125 (Chasanow, J., concurring).

234. *Id.*

d. *Possible Impact Beyond Referral Fee Agreements.*—Perhaps the most significant aspect of the court's decision in *Post v. Bregman* was its determination that the Rules, as public policy, have the force of law.²³⁵ This liberal interpretation of the effect of the MLRPC will likely open new avenues for applying the Rules. Cases in the area of legal malpractice illustrate this possible expansion.

In *Hooper v. Gill*, the Court of Special Appeals faced the question of whether violations of ethics rules in legal malpractice actions are admissible as evidence of a breach of standard of care.²³⁶ In *Hooper*, the court stated that no court in Maryland had ever answered the question of whether a violation of Maryland's Code of Professional Responsibility²³⁷ provided a basis for liability in a legal malpractice case.²³⁸ The *Hooper* court, however, pointed to other jurisdictions that allow a violation of ethical rules to serve as evidence of malpractice.²³⁹ These jurisdictions, the court pointed out, view their corresponding ethics code as having the force of law.²⁴⁰

Now that the *Bregman* court has placed Maryland into the category of states classifying their ethics rules as public policy having the force of law,²⁴¹ the question arises whether future Maryland courts will treat violations of the Rules either as a cause of action in itself or as evidence of malpractice. Although perhaps not envisioned by the *Bregman* court, such a development in legal malpractice law is conceivable given the court's forceful and unequivocal interpretation of MLRPC as a statement of public policy having the force of law.

235. See *Bregman*, 349 Md. at 164, 707 A.2d at 816-17 ("MLRPC constitutes a statement of public policy . . . and it has the force of law.").

236. See *Hooper v. Gill*, 79 Md. App. 437, 441, 557 A.2d 1349, 1351 (1989) (discussing the plaintiff's attempt to introduce evidence regarding violations of the MLRPC as evidence of his attorney's breach of contract); *supra* notes 149-151 (discussing *Hooper*); see also Gary A. Munneke & Anthony E. Davis, *The Standard of Care in Legal Malpractice: Do The Model Rules of Professional Conduct Define It?*, 22 J. LEGAL PROF. 33, 57-58 (1998) (discussing the impact of the Model Rules on legal malpractice in different jurisdictions including those that classify their ethics codes as public policy with the force of law).

237. The Code of Professional Responsibility was superseded by the Maryland Rules of Professional Conduct in 1987. 13 Md. Reg. 3 (1986).

238. *Hooper*, 79 Md. App. at 442, 557 A.2d at 1352.

239. *Id.* at 443-44, 557 A.2d at 1352 (citations omitted).

240. *Id.* The court cited a number of cases. See *Fishman v. Brooks*, 487 N.E.2d 1377, 1381 (Mass. 1986) (holding that any violation of an ethics rule is not a per se breach of duty, but "[a]s with statutes and regulations, . . . if a plaintiff can demonstrate that a disciplinary rule was intended to protect one in his position, a violation of that rule may be some evidence of the attorney's negligence" (citations omitted)); *Lipton v. Boesky*, 313 N.W.2d 163, 167 (Mich. Ct. App. 1981) (ruling that the Code of Professional Responsibility constitutes public policy and "as with statutes, a violation of the Code is rebuttable evidence of malpractice").

241. *Bregman*, 349 Md. at 164, 707 A.2d at 816.

5. *Conclusion.*—In *Post v. Bregman*, the Court of Appeals held that an attorney may invoke a violation of Rule 1.5(e) of the MLRPC as a defense to a breach of contract claim in order to render that contract unenforceable.²⁴² This outcome is consistent with a recent line of Maryland cases suggesting the strength and relevance of the MLRPC outside the confines of disciplinary proceedings.²⁴³ Although this unquestionably constitutes an extension of the scope of the MLRPC regarding fee agreements, the court was careful to place limitations on the defense. However, given the clarity and strength of the court's argument that the MLRPC constitute public policy and have the force of law, violations of other provisions in the MLRPC similarly may be recognized outside of the disciplinary context, most notably in legal malpractice actions.

MARK T. ODULIO

242. *Id.* at 168, 707 A.2d at 818-19.

243. *See supra* notes 75-114 and accompanying text (describing cases in which courts gave credence to the MLRPC).

XII. PUNITIVE DAMAGES

A. *Abrogation of the Jury's Traditional Role in Determining Punitive Damages*

In *Bowden v. Caldor, Inc.*,¹ the Court of Appeals considered whether the Maryland Constitution guarantees a plaintiff the option of a new trial when a court reduces a punitive damages award for excessiveness.² The majority held that, consistent with Article 23 of the Maryland Declaration of Rights, a court may reduce an excessive punitive damages award without granting a plaintiff the option of a new trial.³ The court reasoned that judges may reduce verdicts without violating a plaintiff's right to a trial by jury because, unlike the federal constitution, Maryland's constitution does not contain a "Reexamination Clause."⁴ Furthermore, the court concluded that a trial court could reduce a punitive damages award without granting a new trial because factors limiting punitive damages awards are principles of Maryland common law, rather than questions of fact.⁵ As characterized by the Court of Appeals, the application of legal principles does not violate either the Reexamination Clause or the Maryland Constitution, which preserve only the right to a jury trial with regard to issues of fact. In its analysis, the majority misinterprets the function of the Reexamination Clause. The court also misconstrues Supreme Court precedent that sanctions appellate review of a trial judge's refusal to grant a new trial in cases involving excessive compensatory and punitive damages verdicts. Moreover, the majority seemingly ignores the Maryland common law tradition of preserving the jury's role in determining both compensatory and punitive damages awards. As a result, the court sacrifices a plaintiff's common law right to a jury by his or her peers for the sake of judicial economy. This decision could ultimately result in unfettered judicial discretion in ascertaining appropriate punitive damages awards, inconsistent treatment of similarly situated plaintiffs, and forum shopping. Finally, it may also deter plaintiffs from asserting legal rights they would otherwise pursue.

1. 350 Md. 4, 710 A.2d 267 (1998).

2. *Id.* at 43, 710 A.2d at 286.

3. *Id.* at 47, 710 A.2d at 288.

4. The Reexamination Clause of the Seventh Amendment states that "no fact tried by a jury, shall be otherwise re-examined in any Court." U.S. CONST. amend. VII, cl. 2.

5. *Bowden*, 350 Md. at 47, 710 A.2d at 288 ("[T]he court, in applying legal principles to reduce a jury's punitive damages award, is performing a legal function and not acting as a second trier of fact.").

1. *The Case.*—Petitioner Samuel David Bowden, a sixteen year-old African American, was hired as a customer service representative in March 1988 by Caldor, a regional retail department store.⁶ On June 15, 1988, two employees of Caldor's security department detained Bowden soon after he arrived at work.⁷ The Caldor security personnel held Bowden in a small, windowless store office for more than four hours, interrogated him, and accused him of stealing money and merchandise from the store.⁸ Bowden repeatedly denied the accusations, and the security guards thwarted every attempt he made to contact his parents or leave the room.⁹ Ultimately, as a result of intimidation and fear, Bowden yielded to the officers' demands and signed a written statement stating that he committed theft at the store.¹⁰ Upon securing a confession, the officers released Bowden, and Bowden promptly informed his parents of the interrogation and coercion.¹¹

Bowden and his mother returned to the store the following day to discuss the matter with another store manager and the security manager.¹² During the encounter, the store manager shouted racial slurs at Bowden, grabbed Bowden's arm, led him to the store's security office, and insisted that Bowden and his parents recompense Caldor for the alleged theft.¹³ Bowden refused the officer's demands and was subsequently handcuffed, escorted through the store, and detained in open view of store customers and his fellow employees.¹⁴ Baltimore County police officers eventually arrived at the store to arrest him.¹⁵ A juvenile court dismissed the charges against Bowden in December 1988 due to insufficient evidence.¹⁶

6. *Id.* at 12, 710 A.2d at 271.

7. *Id.*

8. *Id.*

9. *Id.*

10. *Id.*

11. *Id.* Bowden was finally released from the store office at approximately 11:00 p.m., nearly two hours after Caldor's scheduled closing time. *Id.*

12. *Id.*

13. *Id.* at 13, 710 A.2d at 271. According to the evidence presented at trial, the store manager specifically said: "You people—you nigger boys make me sick, but you're going to burn for this, you sucker." *Id.* at n.1. Moreover, the security manager smirked in response to the store manager's comment indicating that the security manager shared the same acrimonious sentiment towards African Americans. *Id.*

14. *Id.* at 13, 710 A.2d at 271.

15. *Id.*

16. *Id.* The juvenile court found there was insufficient evidence to conclude Bowden was responsible for the thefts. *Id.* In fact, the court concluded that Caldor failed to prove the alleged thefts occurred at all. *Id.*

Bowden brought a civil action against Caldor and several of its security personnel, alleging false imprisonment, malicious prosecution, defamation, wrongful discharge, and intentional infliction of emotional distress.¹⁷ The jury awarded Bowden \$110,000 in compensatory damages apportioned in varying amounts among the five torts alleged in the suit.¹⁸ The jury also awarded Bowden \$350,000 in punitive damages; however, the jury made no indication regarding the apportionment of the award among the various torts.¹⁹ Thereafter, Caldor filed motions for judgment notwithstanding the verdict (JNOV), a new trial, and/or a remittitur.²⁰ The circuit court granted the JNOV motion on the wrongful discharge and intentional infliction of emotional distress counts,²¹ but upheld the punitive damages award and denied a new trial.²²

The Court of Appeals upheld the lower court's rulings concerning liability,²³ but reversed the denial of a new trial on the issue of punitive damages because the punitive damages award had not been apportioned among the specific tort counts.²⁴ Consequently, the case was remanded to the circuit court for a new trial to calculate punitive

17. *Id.* Bowden brought the action in the Circuit Court for Baltimore City seeking compensatory and punitive damages. *Id.*

18. *Id.*

19. *Id.* A separate trial was held exclusively for the determination of punitive damages. *Id.*

20. *Id.* Remittitur is defined as:

The procedural process by which an excessive verdict of the jury is reduced. If money damages awarded by a jury are grossly excessive as a matter of law, the judge may order the plaintiff to remit a portion of the award. In the alternative, the court may order a complete new trial or a trial limited to the issue of damages. The court may also condition a denial of a motion for new trial upon the filing by the plaintiff of a remittitur in a stated amount.

BLACK'S LAW DICTIONARY 897 (6th ed. 1991).

21. *Bowden*, 350 Md. at 13, 710 A.2d at 271. The court's decision to grant JNOV on two counts reduced the compensatory damages award from \$110,000 to \$60,000. *Id.* at 13-14, 710 A.2d at 271.

22. *Id.* at 14, 710 A.2d at 271.

23. *Caldor, Inc. v. Bowden*, 330 Md. 632, 663-64, 625 A.2d 959, 974 (1993). The Court of Appeals granted certiorari before the Court of Special Appeals had an opportunity to hear the case. *Id.* at 641, 625 A.2d at 963.

24. *Id.* at 663-64, 625 A.2d at 974. Judge Chasanow explained for the court:

The requirement of a compensatory damages foundation protects defendants from being punished for acts that the trial court determines the defendant did not commit. In assessing punitive damages, a jury might have been influenced by the number of distinct civil wrongs the defendants committed. In light of this concern . . . the award of punitive damages must be vacated and a new trial ordered for the sole purpose of calculating punitive damages based on the three remaining torts . . .

Id. at 663, 625 A.2d at 974.

damages based on the three viable counts of false imprisonment, defamation, and malicious prosecution.²⁵

Following a second trial on punitive damages in the Circuit Court for Baltimore City, a jury awarded Bowden \$9 million in punitive damages, \$3 million apportioned to each of the three torts for which liability was proved.²⁶ Caldor filed a "Motion for remittitur and/or JNOV and/or for a new trial" in response to the large award of punitive damages.²⁷ The circuit court denied the motions for JNOV and a new trial, but granted the motion for remittitur, finding the award of \$9 million excessive.²⁸ The court reduced the punitive damages award from \$9 million to \$350,000, allocating the award among the three torts.²⁹

The Court of Special Appeals affirmed the circuit court's ruling based on its understanding of the Court of Appeals's previous decision—granting a new trial to calculate punitive damages—as limiting the punitive damages award for the three remaining torts to \$350,000.³⁰ The Court of Special Appeals indicated:

"[B]ecause a punitive damage award on retrial in excess of what was awarded in the original trial is inconsistent with the mandate and opinion of the Court of Appeals, then it necessarily follows that there would be no constructive purpose of the trial court to offer [Bowden] the choice between remittitur and a new trial because no matter how many new trials were given, a verdict over \$350,000 would not be permitted to stand."³¹

25. *Id.* at 663, 625 A.2d at 974.

26. *Bowden*, 350 Md. at 14-15, 710 A.2d at 272. Both sides presented new evidence at the new trial. *Id.* The judge instructed the jury as to the purpose of awarding punitive damages and the requisite proof for an award. *Id.* at 15, 710 A.2d at 272. While the jury learned the amount of compensatory damages awarded in the first trial for the three remaining counts, it did not learn the amount of punitive damages awarded by the first jury. *Id.*

27. *Id.* at 15, 710 A.2d at 272.

28. *Id.*

29. *Id.* The court reduced the award to the exact amount awarded in the first trial, allocating \$116,500 for defamation, \$117,000 for malicious prosecution, and \$116,500 for false imprisonment. *Id.* Supporting its decision to reduce the award, the circuit court emphasized the unfairness of subjecting the defendants to an award grossly exceeding the award by the first jury and expressed concern that a higher award would result in a "chilling effect" on a defendant's right to appeal. *Id.*

30. *Id.* at 17, 710 A.2d at 273.

31. *Id.* (alterations in original) (quoting *Bowden v. Caldor, Inc.*, No. 2056 (Md. Ct. Spec. App. May 15, 1996)).

Bowden then filed a petition for writ of certiorari, which the Court of Appeals granted.³² On appeal, Bowden presented the following arguments to Maryland's highest court: (i) the intermediate court erroneously construed the Court of Appeals's earlier opinion as precluding a punitive damages award in excess of \$350,000 on retrial; (ii) the circuit court erred when it focused on the chilling effect a higher damages award on retrial would have on a defendant's right to appeal;³³ and (iii) the circuit court's reduction of the jury's award and failure to grant the option of a new trial on punitive damages violated his right to a jury trial under Article 23 of the Maryland Declaration of Rights.³⁴

2. *Legal Background.*—The availability of punitive damages in tort actions is well established under Maryland law.³⁵ Maryland courts have consistently held that the two principal goals of punitive damages awards are punishment and deterrence.³⁶ While Maryland law permits punitive damages, a plaintiff has no right or entitlement to such

32. *Bowden v. Caldor, Inc.*, 343 Md. 745, 684 A.2d 836 (1996).

33. In justifying its reduction of the punitive damages award, the circuit court explained that "[t]o subject the defendants to nine million dollars in punitive damages after they successfully appealed an award of \$350,000 [demonstrates a] kind of arbitrariness and violation of fundamental fairness." *Bowden*, 350 Md. at 15, 710 A.2d at 272 (quoting the trial court). Furthermore, the circuit court stated that "the Court of Appeals doesn't intend to bushwhack successful appellants and that the price of succeeding on appeal is not to be hit with a very large damage claim." *Id.* at 15-16, 710 A.2d at 272 (quoting the trial court). The circuit court relied on *North Carolina v. Pearce*, 395 U.S. 711 (1969), *overruled by Alabama v. Smith*, 490 U.S. 794 (1989), to support its conclusion that a punitive damages award in excess of the initial \$350,000 would be fundamentally unfair. In *Pearce*, the Supreme Court held that in the case of a retrial following a successful appeal, the Due Process Clause of the Fourteenth Amendment barred a judge from vindictively imposing a harsher sentence on a *criminal* defendant absent subsequent misconduct. *Id.* at 725-26. The Court of Appeals agreed with Bowden's argument that the principle established in *Pearce* applied only in criminal cases. *Bowden*, 350 Md. at 19-20, 710 A.2d at 274.

34. *Bowden*, 350 Md. at 17-18, 710 A.2d at 273. Article 23 of the Maryland Declaration of Rights states that "[t]he right of trial by Jury of all issues of fact in civil proceedings in the several Courts of Law in this State, where the amount in controversy exceeds the sum of five thousand dollars, shall be inviolably preserved." MD. CODE ANN., CONST., DECL. OF RTS. art. 23, cl. 2 (1981 & Supp. 1998).

35. See *Medairy v. McAllister*, 97 Md. 488, 497, 55 A. 461, 464 (1903) (affirming award of punitive damages where compensation for actual loss to plaintiff would be clearly insufficient); *Baltimore & Ohio R.R. Co. v. Barger*, 80 Md. 23, 34-35, 30 A. 560, 563 (1894) (affirming jury's award of punitive damages where plaintiff was violently assaulted); *Philadelphia, Wilmington & Baltimore R.R. Co. v. Hoefflich*, 62 Md. 300, 304 (1884) (establishing malice requirement to justify punitive damages award).

36. See, e.g., *Owens-Corning Fiberglas Corp. v. Garrett*, 343 Md. 500, 537-38, 682 A.2d 1143, 1161 (1996) ("The purpose of punitive damages is . . . to punish the defendant for egregiously bad conduct toward the plaintiff, [and] to deter the defendant and others contemplating similar behavior.").

damages.³⁷ Once awarded, trial courts have discretion to review a punitive damages verdict for excessiveness.³⁸

37. See *Adams v. Coates*, 331 Md. 1, 15, 626 A.2d 36, 43 (1993) ("[T]he trier of fact has discretion to deny punitive damages even where the record otherwise would support their award." (citing *Nast v. Lockett*, 312 Md. 343, 349, 539 A.2d 1113, 1116 (1988), *overruled on other grounds by Owens-Illinois v. Zenobia*, 325 Md. 420, 460, 601 A.2d 633, 652 (1992); *Dennis v. Baltimore Transit Co.*, 189 Md. 610, 616, 56 A.2d 813, 816 (1948); MARYLAND CIVIL PATTERN JURY INSTRUCTIONS § 10:6 (a), at 226 (1984))).

38. See *Ellerin v. Fairfax Sav., F.S.B.*, 337 Md. 216, 242, 652 A.2d 1117, 1130 (1995) ("[T]he amount of punitive damages awarded by a jury is reviewable by the trial court for excessiveness." (citing *Banegura v. Taylor*, 312 Md. 609, 624, 541 A.2d 969, 976 (1988); *Conklin v. Schillinger*, 255 Md. 50, 64, 257 A.2d 187, 194 (1969); *Turner v. Washington Sanitary Comm.*, 221 Md. 494, 503, 158 A.2d 125, 130 (1960))). Maryland trial and appellate courts have the authority to review punitive damages awards based on well established common law principles which provide that punitive damages awards must comport with the gravity of the defendant's misconduct. See *id.* In *Alexander & Alexander, Inc. v. B. Dixon Evander & Associates*, 88 Md. App. 672, 714, 596 A.2d 687, 708 (1991), the Court of Special Appeals addressed whether Maryland punitive damages law satisfied the implicit requirements regarding the review of punitive damages awards as outlined in *Pacific Mutual Life Insurance Co. v. Haslip*, 499 U.S. 1, 19-23 (1991). These requirements include: instructions to guide the jury's discretion; post-trial standards to scrutinize awards; and appellate review of punitive damages awards. *Alexander*, 88 Md. App. at 714-15, 596 A.2d at 708. The court found that similar requirements existed under Maryland law and delineated several principles employed to guide the jury's and the court's discretion when determining the appropriate award of punitive damages. *Id.* at 715-16, 596 A.2d at 708-09. According to the guidelines articulated in *Alexander*, punitive damages may be imposed only: (i) where there is "outrageous conduct"; (ii) upon a showing of "actual malice" on the part of a defendant; (iii) to punish the wrongdoer and deter the wrongdoer and others from engaging in the same conduct; (iv) on an individual basis; and (v) where there is actual loss and thus an underlying award of compensatory damages. *Id.* To determine the need for a new trial based on excessive damages, the trial court must consider whether the verdict is "grossly excessive," "inordinate," "outrageously excessive," or "shocks the conscience." See *Banegura*, 312 Md. at 624, 541 A.2d at 976 (discussing the standard to be applied by a trial judge to determine whether a new trial should be granted because of an excessive verdict).

The Supreme Court recently held in *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 568 (1996), that punitive damages awards are subject to limits, as a matter of federal constitutional law, under the Due Process Clause. The *BMW* Court evaluated three "guideposts" to conclude that the \$2 million dollar punitive damages award against BMW transcended constitutional limits under the Due Process Clause: the degree of reprehensibility of the conduct; the disparity between the harm or potential harm suffered by the plaintiff and the punitive damages award; and the difference between the punitive damages award and the civil penalties authorized or imposed in comparable cases. *Id.* at 574-75. In light of the limits established in *BMW*, the *Bowden* court rearticulated the principles of Maryland common law applicable to judicial review of punitive damages awards for excessiveness. *Bowden*, 350 Md. at 27-40, 710 A.2d at 278-85. The *Bowden* court explained that the principles articulated in its opinion were not minimum constitutional requirements but rather modifications of the Maryland common law. *Id.* at 27, 710 A.2d at 278. The court identified nine principles courts should evaluate when assessing the appropriateness of a punitive damages award: proportionality of the award to the gravity of the defendant's behavior; proportionality to the defendant's ability to pay; the deterrence value of the award; the amount of civil or criminal penalties that could be imposed for comparable misconduct; comparable punitive damages awards in the jurisdiction; other punitive damages awards against the defendant for the same conduct; whether multiple punitive damages awards

Maryland trial courts enjoy broad discretion when reviewing jury verdicts for excessiveness. Absent clear abuse of discretion in refusing to remit an award or order a new trial on damages based on a transgression of common law limits for punitive damages awards, a trial court's ultimate decision as to excessiveness is generally "not open on appeal."³⁹ Similarly, the Supreme Court has held that, under the Seventh Amendment, appellate review of a district court's denial of a motion to set aside compensatory and punitive awards as excessive is permissible under an abuse of discretion standard.⁴⁰ In *Gasperini v. Center for Humanities, Inc.*,⁴¹ the Court held that appellate review of a district court's denial of a motion to set aside a compensatory damages award as excessive did not offend the Reexamination Clause of the Seventh Amendment.⁴² Justice Scalia, however, adamantly dissented in *Gasperini*, opining that appellate review of a compensatory

were imposed for the same instance of misconduct; the plaintiff's reasonable costs and expenses resulting from the defendant's conduct, including litigation expenses not included in an award of compensatory damages; and whether the punitive damages award bears a reasonable relationship to the compensatory damages award. *Id.* at 27-40, 710 A.2d at 278-85.

39. *Alexander*, 88 Md. App. at 717, 596 A.2d at 709 (internal quotation marks omitted) (quoting *Continental Cas. Co. v. Mirabile*, 52 Md. App. 387, 399, 449 A.2d 1176, 1184 (1982)). The *Alexander* court vacated the punitive damages award on the ground that it was excessive as a matter of federal constitutional law. *Id.* at 721, 596 A.2d at 711. The Court of Special Appeals proposed three options to deal with the award: (i) assume authority implicit from *Haslip* to reduce the award to what it regarded as a proper amount; (ii) vacate the award and remand the case for reconsideration by the trial judge in the exercise of his authority to require a further remittitur; or (iii) vacate the award and direct a new trial. *Id.* The court mandated a new trial on the issue of damages, reasoning that the reduction of a punitive damages award by an appellate court is an option "foreign to Maryland procedure and not one [to be] select[ed] . . . where . . . more traditional options exist." *Id.* at 721-22, 596 A.2d at 711.

While *Haslip* and *BMW* established a substantive due process right to be protected from excessive punitive damages awards, neither opinion indicated that an appellate court should undertake to calculate the proper award when it determines a particular punitive damages award is excessive. See *BMW*, 517 U.S. at 586 ("Whether the appropriate remedy requires a new trial or merely an independent determination by the Alabama Supreme Court of the award . . . is a matter that should be addressed by the state court in the first instance."); *Haslip*, 499 U.S. at 15-23 (discussing post-trial procedures established by Alabama to ensure meaningful review of punitive damages awards in determining whether the award exceeds common law limits).

40. See *Gasperini v. Center for Humanities, Inc.*, 518 U.S. 415, 436 (1996) (holding that the Seventh Amendment permits appellate review, for abuse of discretion, of a trial judge's denial of a motion to set aside a jury award of compensatory damages as excessive); *Browning-Ferris Indus. v. Kelco Disposal, Inc.*, 492 U.S. 257, 279 (1989) (stating that the role of a federal appellate court is to review, under an abuse of discretion standard, a district court's determination of whether a new trial or remittitur should be ordered because of an excessive punitive damages award).

41. 518 U.S. 415 (1996).

42. *Id.* at 436. See *supra* note 4 for the text of the Reexamination Clause.

damages award is prohibited under the Reexamination Clause.⁴³ Justice Scalia distinguished appellate review involving compensatory damages from appellate review involving punitive damages to reconcile his dissent in *Gasperini* with the Court's opinion in *Browning-Ferris Industries v. Kelco Disposal, Inc.*⁴⁴ In *Browning-Ferris*, the Court implicitly approved appellate review of the trial court's decision to deny a new trial where punitive damages awards were claimed to be excessive.⁴⁵ Justice Scalia justified the *Browning-Ferris* decision by characterizing punitive damages as a legal determination rather than a factual one, thus subjecting them to appellate review.⁴⁶ The majority and dissenting opinions in *Gasperini* evaluated the Reexamination Clause in the context of appellate review of compensatory and punitive damages awards under a limited abuse of discretion standard.⁴⁷ Neither opinion, however, addressed the issue of judicial determination of an appropriate award when the court finds an award excessive.

Traditionally, upon determining that a damages award is excessive, Maryland courts will offer the plaintiff either an opportunity to remit the damages to an appropriate amount determined by the judge or the option of a new trial.⁴⁸

Before *Bowden*, the Court of Appeals had never addressed whether Article 23 of the Maryland Constitution mandates a new trial in cases involving either excessive compensatory or punitive damages.⁴⁹ Article 23 of the Maryland Declaration of Rights states:

The right of trial by Jury of all issues of fact in civil proceedings in the several Courts of Law in this State, where the

43. *Gasperini*, 518 U.S. at 449 (Scalia, J., dissenting).

44. *Id.* at 459 (citing *Browning-Ferris*, 492 U.S. 257).

45. *Browning-Ferris*, 492 U.S. at 279.

46. *Gasperini*, 518 U.S. at 459 (Scalia, J., dissenting).

47. *Gasperini*, 518 U.S. at 434-37; *id.* at 453-55 (Scalia, J., dissenting).

48. See *Conklin v. Schillinger*, 255 Md. 50, 64, 257 A.2d 187, 194 (1969) ("[T]he Maryland practice of granting a new trial by the trial judge in tort cases where the sole ground is an excessive verdict, unless the plaintiff remits the portion of the verdict which the trial court deems excessive, is well established."); *Turner v. Washington Suburban Sanitary Comm'n*, 221 Md. 494, 501-02, 158 A.2d 125, 129 (1960) ("The trial practice of granting a new trial sought by the defendant, unless the plaintiff remit a portion of the verdict which the trial court deems excessive, is well established in Maryland."); *Mezzanotte Constr. Co. v. Gibbons*, 219 Md. 178, 183, 148 A.2d 399, 402 (1959) ("It is generally recognized that a trial court may pass an order for a new trial, unless the plaintiff shall remit a part of a verdict which the court deems excessive." (citing 2 POE, PLEADING AND PRACTICE § 347; 39 AM. JUR. New Trial § 210; 66 C.J.S. New Trial § 209)). See generally *Podolski v. Sibley*, 12 Md. App. 642, 647, 280 A.2d 294, 297 (1971) ("The trial practice of granting a new trial sought by the defendant unless the plaintiff remit a portion of the verdict which the trial court deems excessive is well established in Maryland.").

49. *Bowden*, 350 Md. at 43, 710 A.2d at 286.

amount in controversy exceeds the sum of five thousand dollars, shall be inviolably preserved.⁵⁰

Similarly, the United States Supreme Court has yet to rule on the issue under the Seventh Amendment.⁵¹ The Seventh Amendment contains language similar to the Maryland Constitution:

In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.⁵²

The federal appellate courts are divided on the question whether a plaintiff has a right to a new trial when a jury's punitive damages award is reduced because it is excessive.⁵³

50. MD. CODE ANN., CONST., DECL. OF RTS. art. 23, cl. 2 (1981 & Supp. 1998).

51. See *Bowden*, 350 Md. at 43, 710 A.2d at 286. The Supreme Court strongly suggests in both *Browning-Ferris* and *Gasperini* that a court is required to offer the plaintiff the option of a new trial under the Seventh Amendment when it reduces a damages verdict. See *Browning-Ferris Indus. v. Kelco Disposal, Inc.*, 492 U.S. 257, 279 (1989) ("[T]he role of the district court is to determine whether the jury's verdict is within the confines set by state law, and to determine . . . whether a new trial or remittitur should be ordered."); see also *Gasperini*, 518 U.S. at 435 (quoting the above language from *Browning-Ferris* and stating that the analysis of whether an award of compensatory damages exceeds legal limits is similar to the analysis involving punitive damages). Furthermore, in *Dimick v. Schiedt*, 293 U.S. 474 (1935), the Court stated:

Where the verdict returned by a jury is palpably and grossly inadequate or excessive, it should not be permitted to stand; but, in that event, both parties remain entitled, as they were entitled in the first instance, to have a jury properly determine the question of liability and the extent of the injury by an assessment of damages.

Id. at 486.

52. U.S. CONST. amend. VII. The second clause of the Seventh Amendment, the Reexamination Clause, is not contained in the text of the Maryland Constitution. MD. CODE ANN., CONST., DECL. OF RTS. art. 23.

53. Compare, e.g., *Rowlett v. Anheuser-Busch, Inc.*, 832 F.2d 194, 207 (1st Cir. 1987) (holding that courts should determine the appropriate measure of punitive damages when a jury's award is excessive, in order to avoid the "intolerable burden" of retrial on the parties and the court), *Shimman v. Frank*, 625 F.2d 80, 102 (6th Cir. 1980) (recalculating punitive damages on appeal instead of remanding for a new trial), and *Guzman v. Western State Bank*, 540 F.2d 948, 954 (8th Cir. 1976) (reducing punitive damages award from \$25,000 to \$10,000 without providing option of a new trial) with *Continental Trend Resources, Inc. v. Oxy USA Inc.*, 101 F.3d 634, 643 (10th Cir. 1996) (directing the trial court to grant a new trial limited to punitive damages should the plaintiffs decline to accept the reduced award), *Morgan v. Woessner*, 997 F.2d 1244, 1258 (9th Cir. 1993) ("To avoid any conflict with the Seventh Amendment, the preferable course is to afford the party awarded the grossly excessive punitive damages . . . the option of either accepting the remittitur of the punitive damage award or a new trial on that issue."), *Defender Indus., Inc. v. Northwestern Mut. Life Ins. Co.*, 938 F.2d 502, 507 (4th Cir. 1991) (holding that the Seventh Amendment "guarantees the right to a jury determination of the amount of punitive damages" and reversing the lower court's decision to reduce an excessive award without grant-

The Fourth Circuit's review of the issue in *Defender Industries, Inc. v. Northwestern Mutual Life Insurance Co.*⁵⁴ is illustrative of the nebulous aspects involved in determining whether a plaintiff has a right to a jury calculation of punitive damages. In *Defender Industries*, a federal district court found a \$5 million punitive damages award excessive, and, in lieu of following the established practice of ordering a new trial nisi remittitur,⁵⁵ the court reduced the award to \$10,000.⁵⁶ The district court's decision was consistent with then existing Fourth Circuit precedent. In *Shamblin's Ready Mix, Inc. v. Eaton Corp.*,⁵⁷ the Fourth Circuit held that the Seventh Amendment does not guarantee a plaintiff the right to a jury determination of punitive damages.⁵⁸ The *Shamblin* court relied on the Supreme Court's decision in *Tull v. United States*⁵⁹ in arriving at its conclusion.⁶⁰ In *Tull*, the Supreme Court held that the determination of the amount of a civil penalty imposed for violation of a federal statute could be delegated to a trial judge.⁶¹ The *Shamblin* court extended the *Tull* Court's reasoning to

ing the plaintiff the option of a new trial), and *McKinnon v. City of Berwyn*, 750 F.2d 1383, 1391 (7th Cir. 1984) (holding that the judge violated proper procedure in reducing the award without giving the plaintiff the option of a new trial). Although several federal circuit courts have reduced punitive damages awards themselves upon finding a jury award of punitive damages excessive, none of these courts addressed the constitutional issue of the right to a trial by jury under the Seventh Amendment. See *Rowlett*, 832 F.2d at 207; *Shimman*, 625 F.2d at 102; *Guzman*, 540 F.2d at 954. The Fourth Circuit noted this absence of discussion regarding the constitutional authority of courts to reduce excessive punitive damages without granting the option of a new trial in *Defender Industries* and held that a new trial must be offered under the Seventh Amendment when an award is initially deemed excessive. *Defender Industries*, 938 F.2d at 507.

54. 938 F.2d 502 (4th Cir. 1991).

55. New trial *nisi* remittitur indicates that a new trial will be granted unless the plaintiff agrees to remit the award; *nisi* is Latin for "unless." BLACK'S LAW DICTIONARY, *supra* note 20, at 725; see also *Defender Industries*, 938 F.2d at 505 ("Under traditional procedure, a district court . . . could set aside the excessive verdict by granting a new trial or a new trial *nisi* remittitur." (citing *Browning-Ferris*, 492 U.S. at 278-79; 11 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 2815 (1973 & Supp. 1991))).

56. *Defender Indus., Inc. v. Northwestern Mut. Life Ins. Co.*, 727 F. Supp. 252, 261 (D.S.C. 1989), *rev'd*, 938 F.2d 502 (4th Cir. 1991).

57. 873 F.2d 736 (4th Cir. 1989).

58. *Id.* at 742 ("[W]e hold that the seventh amendment does not require that the amount of punitive damages be assessed by a jury.").

59. 481 U.S. 412 (1987). In *Tull*, the government sought civil penalties and injunctions against a real estate developer under the Clean Water Act. *Id.* at 414. After examination of the legislative history of the Clean Water Act, the Court concluded that Congress intended trial judges to assess civil penalties, and that this assessment procedure was consistent with the Seventh Amendment. *Id.* at 427. The Court held that in cases where specific penalties are established by the law, jury determination of the amount of penalty is not required under the Seventh Amendment. *Id.* at 426-27.

60. *Shamblin's*, 873 F.2d at 741-42.

61. *Tull*, 481 U.S. at 427.

punitive damages awards, concluding that “[t]here is no principled distinction between civil penalties and the modern concept of punitive damages” because both serve to punish misconduct.⁶² The *Shamblin* court also reiterated the holding in *Tull* that the “determination of a remedy in a civil trial is not an essential function of a jury trial.”⁶³

Nonetheless, in *Defender Industries*, the Fourth Circuit refused to accept its previous application of *Tull* to punitive damages and reversed *Shamblin*, finding that the assessment by a jury of the amount of punitive damages “is an inherent and fundamental element of the common-law right to trial by jury.”⁶⁴ The court in *Defender* repudiated *Shamblin*’s extension of *Tull*, stating that the *Tull* reasoning applied only to civil penalties that were specified by statute and imposed for the violation of a federal statutory law.⁶⁵ The *Defender* court based its decision—that a plaintiff is guaranteed the right to a jury assessment of the amount of punitive damages—on the common-law right to a trial by jury established in the first clause of the Seventh Amendment.⁶⁶

On the other hand, some federal circuit courts hold that judicial economy concerns outweigh the preservation of a litigant’s common-law right to assessment of punitive damages by a jury. For example, in *Shimman v. Frank*,⁶⁷ the Sixth Circuit reduced an excessive punitive damages award itself, instead of remanding for recalculation in a new trial.⁶⁸ The court felt the case was appropriate for direct remission because the parties had pursued resolution for over six years and because uncontested evidence was presented adequately in the record.⁶⁹ Likewise, in *Rowlett v. Anheuser-Busch, Inc.*,⁷⁰ the First Circuit questioned the utility of remanding a case solely for a determination of punitive damages, stressing that remand would “place an intolerable burden on the parties and the court.”⁷¹

Finally, the Supreme Court of Hawaii has also addressed this issue, under its state constitution, in *Kang v. Harrington*.⁷² The *Kang*

62. *Shamblin*’s, 873 F.2d at 742.

63. *Id.* at 741.

64. *Defender Indus., Inc. v. Northwestern Mut. Life Ins. Co.*, 938 F.2d 502, 507 (4th Cir. 1991).

65. *Id.* at 506.

66. *Id.* at 507.

67. 625 F.2d 80 (6th Cir. 1980).

68. *Id.* at 102.

69. *Id.* (holding that “[b]oth sides deserved final adjudication”).

70. 832 F.2d 194 (1st Cir. 1987).

71. *Id.* at 207.

72. 587 P.2d 285 (Haw. 1978).

court held that when a jury assesses punitive damages, remittitur without the option of a new trial would violate the Hawaii State Constitution provision,⁷³ which states: "In suits at common law where the value in controversy shall exceed five thousand dollars, the right of trial by jury shall be preserved."⁷⁴ This provision is similar to Maryland's, because neither has a clause analogous to the Seventh Amendment's Reexamination Clause.

Thus, although Maryland courts traditionally provide an option of remittitur or new trial where damages are deemed excessive, the *right* to a new trial had never been addressed prior to the *Bowden* decision.

3. *The Court's Reasoning.*—In *Bowden v. Caldor*, the Court of Appeals held that Article 23 of the Maryland Constitution does not guarantee a right to a new trial upon a judicial finding that a punitive damages award is excessive. To reach this conclusion, the court evaluated the Supreme Court's Seventh Amendment jurisprudence. The court then examined the way Maryland courts have handled excessive damages determinations, ultimately locating the lack of a right to a new trial in the characterization of the judicial determination of an appropriate punitive damages award as a legal question.

The Court of Appeals began its opinion by agreeing with *Bowden's* argument that its prior decision did not indicate that the \$350,000 punitive damages award initially constituted a limit on the amount of punitive damages the second jury could award.⁷⁵ The court emphasized that the evidence presented at the second trial could be different as could the judgment of the new jury.⁷⁶ In fact, the court stated that the prior vacated award should receive no consideration at the new damages trial.⁷⁷ Furthermore, the court concluded that the Due Process Clause of the Fourteenth Amendment, which bars a judge from imposing a harsher sentence on a defendant's successful appeal, does not apply to tort actions for money damages.⁷⁸

73. *Id.* at 293 n.3.

74. HAW. CONST. art. 1, § 13.

75. *Bowden*, 350 Md. at 19, 710 A.2d at 274.

76. *Id.*

77. *Id.* at 20, 710 A.2d at 275 ("The effect of the granting of a new trial is to set aside the [judgment] and leave the cause in the same condition as if no judgment had been entered." (quoting *Tiller v. Elfenbein*, 205 Md. 14, 19, 106 A.2d 42, 44 (1954) (internal quotation marks omitted))).

78. *Id.* at 19-20, 710 A.2d at 274-75. The court acknowledged that the Supreme Court's holding in *North Carolina v. Pearce*, 395 U.S. 711 (1969), *overruled by Alabama v. Smith*, 490 U.S. 794 (1989), precluded a judge from giving a harsher sentence to a criminal defendant on appeal, absent misconduct subsequent to the initial sentencing. The *Bowden* court fur-

The Court of Appeals relied on Supreme Court opinions examining the Seventh Amendment to interpret Article 23 of the Maryland Constitution,⁷⁹ particularly focusing on the majority opinion and Justice Scalia's dissent in *Gasperini v. Center for Humanities, Inc.*⁸⁰ The *Bowden* court argued that, in *Gasperini*, the Supreme Court held that the Seventh Amendment requires a plaintiff to be given the option of a new trial when a court reduces a compensatory damages award for excessiveness.⁸¹ The Court of Appeals concluded that the Supreme Court's position was based on the second clause of the Seventh Amendment, the Reexamination Clause, which states that "no fact tried by a jury, shall otherwise be re-examined in any Court" rather than the first clause, which states that "the right of trial by jury shall be preserved."⁸² The Court of Appeals distinguished the Maryland Constitution from the Seventh Amendment because the former contains no Reexamination Clause.⁸³ While the court did not elaborate on the significance of the absence of this clause, it did suggest that direct judicial review and judicial determination of a damages award is compatible with Article 23.⁸⁴

While recognizing that the Court of Appeals had not considered the right to a new trial upon the reduction of either a compensatory or punitive damages award, the court discussed Maryland *practice* when damages are found excessive.⁸⁵ The court noted that the option

ther explained, however, that "[n]o decision of this Court, of the Supreme Court, or of the highest court in any state, applying this rationale to a civil tort action for money damages, ha[s] been called to [its] attention." *Bowden*, 350 Md. at 20, 710 A.2d at 274-75.

79. *Id.* at 44, 710 A.2d at 286-87. The court recognized that the Seventh Amendment was inapplicable to state court proceedings but nevertheless found the Seventh Amendment cases instructive because the Seventh Amendment and Article 23 of the Maryland Declaration of Rights contain similar clauses establishing the right of trial by jury on factual issues. *Id.* Federal appellate courts that have addressed the constitutionality of remittitur without the option of a new trial relied on the right of trial by jury clause to conclude that, under the Seventh Amendment, a trial court must give a plaintiff the option of a new trial when it reduces an excessive punitive damages verdict. *See supra* notes 64-66 and accompanying text.

80. 518 U.S. 415 (1996).

81. *Bowden*, 350 Md. at 44, 710 A.2d at 286-87 (citing *Gasperini*, 518 U.S. at 431-33).

82. U.S. CONST. amend. VII; *Bowden*, 350 Md. at 44, 710 A.2d at 287.

83. *See Bowden*, 350 Md. at 44-45, 710 A.2d at 287. Article 23 of the Maryland Declaration of Rights provides that "the right of trial by Jury of all issues of fact in civil proceedings . . . shall be inviolably preserved." MD. CODE ANN., CONST., DECL. OF RTS. art. 23, cl. 2 (1981 & Supp. 1998).

84. *Bowden*, 350 Md. at 44-45, 710 A.2d at 286-87 (interpreting Supreme Court precedent as holding that a plaintiff is guaranteed the option of a new trial when a court reduces a compensatory damages verdict based on the Reexamination Clause of the Seventh Amendment, and declaring that the Maryland Constitution contains no such clause).

85. *Id.* at 46, 710 A.2d at 287.

of a new trial typically accompanies a court's reduction of a compensatory damages award.⁸⁶ Nonetheless, the court identified Maryland decisions that reduced punitive damages awards without granting a new trial.⁸⁷ In addition, the court noted that a court is permitted to reduce a jury's award of compensatory damages to comply with a statutory cap on noneconomic damages.⁸⁸

The Court of Appeals's conclusion that a plaintiff has no right to a new trial when a punitive damages award is found excessive was grounded in distinction between law and fact.⁸⁹ The court characterized factors limiting the size of punitive damages awards as principles of law and described Maryland common law and federal due process limits on punitive damages⁹⁰ as legal limits similar to statutory limitations or caps.⁹¹ The court reasoned that in applying legal principles to reduce a jury's punitive damages award, a court "is performing a

86. *Id.* (citing *Conklin v. Schillinger*, 255 Md. 50, 64-66, 257 A.2d 187, 194 (1969); *Safeway Trails, Inc. v. Smith*, 222 Md. 206, 223, 159 A.2d 823, 833 (1960); *Turner v. Washington Suburban Sanitary Comm'n*, 221 Md. 494, 501-03, 158 A.2d 125, 129-30 (1960); *Banegura v. Taylor*, 312 Md. 609, 624-25, 541 A.2d 969, 976-77 (1988)); *see also supra* note 48 and accompanying text.

87. *Bowden*, 350 Md. at 46, 710 A.2d at 288 (citing *Montgomery Ward & Co. v. Cliser*, 267 Md. 406, 425, 298 A.2d 16, 27 (1972); *Heinze v. Murphy*, 180 Md. 423, 434, 24 A.2d 917, 923 (1942)). Actually, neither of the cases cited by the court involved a finding and subsequent reduction of excessive punitive damages. In *Cliser*, the jury inadvertently tripled the same award; in *Heinze*, the appellate court found that no grounds existed for the imposition of punitive damages. *See Cliser*, 267 Md. at 425, 298 A.2d at 27; *Heinze*, 180 Md. at 434, 24 A.2d at 923.

88. *Bowden*, 350 Md. at 46, 710 A.2d at 288 (citing *Murphy v. Edmonds*, 325 Md. 342, 370-75, 601 A.2d 102, 116 (1992)).

89. *Id.* at 47, 710 A.2d at 288.

90. The factors limiting punitive damages awards referred to by the court include: proportionality to the gravity of the defendant's wrong, proportionality to the defendant's ability to pay, the deterrence value of the amount awarded, the legislative policy reflected in statutes setting criminal fines, comparable awards within the jurisdiction, existence of other awards against the defendant for the same conduct, whether multiple torts arose from a single occurrence of bad conduct, the plaintiff's reasonable litigation costs, and the relationship to the underlying compensation damages award. *Id.* at 27-39, 710 A.2d at 278-85; *see also supra* note 38 and accompanying text.

91. *Bowden*, 350 Md. at 47, 710 A.2d at 288. The Court of Appeals relied heavily on Justice Scalia's dissent in *Gasperini* to support its law-fact distinction between compensatory and punitive damages. *Id.* at 44-47, 710 A.2d at 286-88. In the context of deciding whether federal appellate review of a district court's refusal to set aside an arguably excessive award was precluded by the Seventh Amendment's Reexamination Clause, Justice Scalia stated:

Unlike the measure of actual damages suffered, which presents a question of historical or predictive fact, the level of punitive damages is not really a "fact" "tried" by the jury. In none of our cases holding that the Reexamination Clause prevents federal appellate review of claims of excessive damages does it appear that the damages had a truly "punitive" component.

Gasperini v. Center for Humanities, Inc., 518 U.S. 415, 459 (1996) (Scalia, J., dissenting) (citations omitted).

legal function and not acting as a second trier of fact,” and therefore not impairing the “right of trial by jury of all issues of fact” that is guaranteed by Article 23 of the Maryland Declaration of Rights.⁹² Conceding that reducing a punitive damages award involves a review of evidence, the court compared the function to the grant of a judgment notwithstanding the verdict.⁹³ Finally, the court held that while a trial court may, in its discretion, grant a plaintiff a new trial option, the court is not required to do so under Article 23.⁹⁴

4. *Analysis.*—To conclude that a litigant does not have a right to a new trial when a court reduces an excessive punitive damages verdict, the *Bowden* court misinterpreted the function of the Reexamination Clause of the Seventh Amendment, and the significance of the absence of a similar clause in the Maryland Constitution. The court also misapplied Justice Scalia’s law-fact distinction in *Gasperini* concerning appellate review of punitive damages awards to the issue of judicial determination of punitive damages awards under Article 23 of the Maryland Declaration of Rights. In holding that Samuel Bowden did not have a constitutional right to a new trial for punitive damages, the *Bowden* court disregarded Maryland, Fourth Circuit, and Supreme Court precedent which strongly indicated, and in one instance expressly held, that the jury has an exclusive role in determining punitive damages verdicts. Moreover, the *Bowden* decision undermined a well-established tradition and practice of giving the jury discretion to determine the amount of damages a particular defendant’s conduct merits.

a. *Misinterpretation of Maryland and Supreme Court Precedent.*—The majority opinion in *Bowden* mistakenly interprets *Gasperini*’s holding concerning the effect of the Seventh Amendment’s Reexamination Clause on appellate review of a damages award. The court reads *Gasperini* as implicating and, ultimately, diminishing the right to a jury trial on damages after a court finds an initial punitive damages award unacceptable.⁹⁵ Although the Seventh Amendment does not apply to questions of Maryland constitutional law, the majority relies heavily on

92. *Bowden*, 350 Md. at 47, 710 A.2d at 288; see MD. CODE ANN., CONST., DECL. OF RTS. art. 23, cl. 2 (1981 & Supp. 1998).

93. *Bowden*, 350 Md. at 47, 710 A.2d at 288.

94. *Id.*

95. *Id.* at 56, 710 A.2d at 293 (Bell, C.J., dissenting and concurring). The court held that after an initial punitive damages award is rejected by a trial or appellate court, the plaintiff is not guaranteed a new determination of the proper award by a jury. *Bowden*, 350 Md. at 47, 710 A.2d at 288.

Justice Scalia's dissenting opinion concerning the Reexamination Clause to conclude that Maryland litigants do not have a right to a new trial when a punitive damages award is deemed excessive by a trial judge.⁹⁶

The Court of Appeals mischaracterized the holding of *Gasperini*. A careful reading of *Gasperini* reveals that the decision focused on appellate review of a jury verdict as opposed to the right to a jury determination of the actual award. In *Gasperini*, the Supreme Court held that the Reexamination Clause of the Seventh Amendment did not prohibit a federal appellate court's review, under an abuse of discretion standard, of a federal trial court's refusal to set aside a compensatory damages award as excessive.⁹⁷ After reviewing recent decisions such as *Browning-Ferris Industries v. Kelco Disposal, Inc.*,⁹⁸ the Court, for the first time, expressly held that "'nothing in the Seventh Amendment . . . precludes appellate review of the trial judge's denial of a motion to set aside [a jury verdict] as excessive.'"⁹⁹ The majority did not question that the damages determination should be made by the jury.¹⁰⁰

Justice Scalia's cogent dissent, on which the *Bowden* court relied, distinguished between punitive and compensatory damages only in the context of the authority of an appellate court to review a trial judge's refusal to set aside an award for excessiveness.¹⁰¹ As the *Bowden* dissent emphasized, "Justice Scalia's concern was not with a jury determination of punitive damages, but rather the nature of the in-

96. *Bowden*, 350 Md. at 44-47, 710 A.2d at 286-88.

97. *Gasperini v. Center for Humanities, Inc.*, 518 U.S. 415, 435-36 (1996). The Court acknowledged the traditional and well-recognized authority of trial judges to grant new trials in cases of excessive damages. *Id.* at 433 ("[T]he reexamination clause does not inhibit the authority of trial judges to grant new trials for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the United States." (quoting FED. R. CIV. P. 59(a))). In contrast, the Court noted that appellate review of a trial court's assessment as to the appropriateness of damages "is a relatively late, and less secure, development." *Id.* at 434 (noting that appellate review of a federal trial court's denial of a motion to set aside a jury's verdict as excessive "was once deemed inconsonant with the Seventh Amendment's reexamination clause" (citing *Lincoln v. Power*, 151 U.S. 436, 437-38 (1894); *Williamson v. Osenton*, 220 F. 653, 655 (4th Cir. 1915))).

98. 492 U.S. 257, 280 (1989) (indicating that appellate courts may review, under an abuse of discretion standard, a trial court's refusal to set aside a punitive damages verdict for excessiveness without violating the Seventh Amendment). Note that *Gasperini* and *Browning-Ferris* are distinguishable, as *Gasperini* addressed appellate review of compensatory damages and *Browning-Ferris* involved punitive damages.

99. *Gasperini*, 518 U.S. at 436 (omission in original) (alteration in original) (quoting *Grunenthal v. Long Island R.R. Co.*, 393 U.S. 156, 164 (1968) (Stewart, J., dissenting)).

100. *See id.* at 433-36.

101. *Id.* at 458-61 (Scalia, J., dissenting); *Bowden*, 350 Md. at 58, 710 A.2d at 293 (Bell, C.J., dissenting and concurring).

quiry into the excessiveness of those damages.”¹⁰² Justice Scalia implicitly authorized appellate review of punitive damages under the Reexamination Clause of the Seventh Amendment because punitive damages are governed by legal standards.¹⁰³ Yet the *Bowden* court attempted to expand his position, citing his opinion as support for the proposition that the determination of the actual amount of punitive damages is a legal question.¹⁰⁴ Justice Scalia did not suggest that a reviewing court had the authority to determine what the proper amount of punitive damages should be.¹⁰⁵ Thus, the holding in *Bowden* is questionable because it misconstrued Justice Scalia’s dissenting opinion in order to support its argument that the determination of punitive damages is a question of law.¹⁰⁶

In short, while review of a punitive damages verdict for excessiveness can be characterized as a legal question and thus permissible under the Reexamination Clause, the determination of the actual award is a factual question preserved for the jury under the first clause of the Seventh Amendment. Since Article 23 of the Maryland Constitution is analogous to the first clause of the Seventh Amendment, a plaintiff should be entitled to a jury determination of a punitive damages award even when a court finds an initial award excessive.¹⁰⁷ Neither the majority or dissent in *Gasperini* suggests anything else.

The *Bowden* majority also misinterprets the importance of the Reexamination Clause with regard to judicial determinations of punitive damages awards. While the Reexamination Clause of the Seventh Amendment was the foundation of Scalia’s argument against appellate review involving compensatory damages, its existence or nonexistence in the Maryland Constitution should not affect the right to a trial by jury for damages. The *Bowden* majority misread *Gasperini* as locating the requirement of the option of a new trial when a court reduces a compensatory damages award as excessive in the Reexami-

102. *Bowden*, 350 Md. at 58, 710 A.2d at 293 (Bell, C.J., dissenting and concurring).

103. *Gasperini*, 517 U.S. at 459 (Scalia, J., dissenting) (“Nor can any weight be assigned to our statement in *Browning Ferris* . . . seemingly approving appellate abuse-of-discretion review of denials of new trials where punitive damages are claimed to be excessive Unlike the measure of actual damages . . . the level of punitive damages is not really a ‘fact’ ‘tried’ by the jury.”).

104. *Bowden*, 350 Md. at 47, 710 A.2d at 388 (applying Justice Scalia’s analysis pertaining to appellate review of a punitive damages award under the Reexamination Clause of the Seventh Amendment to the issue of judicial determination of a punitive damages award under the right of trial by jury clause of Article 23).

105. *Gasperini*, 517 U.S. at 459 (Scalia, J., dissenting).

106. *Bowden*, 350 Md. at 47, 710 A.2d at 288.

107. MD. CODE ANN., CONST., DECL. OF RTS. art. 23, cl. 2 (1981 & Supp. 1998).

nation Clause of the Seventh Amendment.¹⁰⁸ Yet the Supreme Court neither stated nor implied that the right to a new trial was based on the Reexamination Clause; rather, it evaluated the Reexamination Clause in the context of judicial review for excessiveness, not appellate determination of an appropriate award.¹⁰⁹ Thus, the absence of a Reexamination Clause in Maryland's constitution should be irrelevant to the *Bowden* majority, because, according to Supreme Court precedent, the clause concerns appellate review only.¹¹⁰

It is, therefore, evident that the *Bowden* majority misinterpreted the significance of the Reexamination Clause. Accordingly, the majority's holding that the absence of a Reexamination Clause permits the reduction of a punitive damages award without the option of a new trial is flawed.

b. Usurpation of the Jury's Traditional Role.—The *Bowden* court held that in reducing a punitive damages award, the court performs a legal function rather than acting as a second trier of fact.¹¹¹ In particular, the majority likened the reduction of a punitive damages award to the grant of a judgment notwithstanding the verdict.¹¹² The comparison to a JNOV is inappropriate; the characterization of a punitive damages award reduction as a legal determination is contrary to traditional treatment of damages by Maryland, Fourth Circuit, and Supreme Court cases.

First, Maryland and Supreme Court precedent strongly indicate, and the Fourth Circuit expressly holds, that the determination of a punitive damages award is exclusively a question for the jury. For example, in *Alexander & Alexander, Inc. v. B. Dixon Evander & Associates, Inc.*,¹¹³ the Court of Special Appeals, faced with a jury award for punitive damages in excess of due process limits, refused to reduce the damages award, reasoning that Maryland traditionally requires a new trial when an appellate court finds a damages award excessive.¹¹⁴ The

108. *Bowden*, 350 Md. at 44, 710 A.2d at 286-87.

109. *Gasperini*, 518 U.S. at 434-36.

110. *Id.*

111. *Bowden*, 350 Md. at 47, 710 A.2d at 288.

112. *Id.*

113. 88 Md. App. 672, 596 A.2d 687 (1991).

114. *Id.* at 722, 596 A.2d at 711; *see also* *Banegura v. Taylor*, 312 Md. 609, 624, 541 A.2d 969, 976 (1988) ("A trial judge, upon finding a verdict excessive, may order a new trial unless the plaintiff will agree to accept a lesser sum fixed by the court." (citing *Conklin v. Schillinger*, 255 Md. 50, 67, 257 A.2d 187, 196 (1969); 2 POE, PLEADING AND PRACTICE § 347 (4th ed. 1969)); *Conklin*, 255 Md. at 67, 257 A.2d at 196 (recognizing and accepting federal trial judges' unchallenged power to deny a motion for a new trial provided plaintiffs accepted a reduced damages award on remittitur); *Medairy v. McAllister*, 97 Md. 488, 497, 55

Court of Special Appeals emphasized the importance of giving proper guidance to the jury to insure appropriate awards.¹¹⁵ More importantly, the *Alexander* court stated: "It is for the jury to determine the amount of damages; the role of judges is merely to assure that it has not exceeded the instructions given it or the supervening legal constraints placed on its discretion."¹¹⁶

The Fourth Circuit in *Defender Industries* also discussed extensively the common-law right of a trial by jury under the Seventh Amendment.¹¹⁷ Referring to numerous Supreme Court cases that stress the fundamental nature of a jury assessment of the amount of punitive damages,¹¹⁸ the Fourth Circuit held that the Seventh Amendment guaranteed a right to a jury determination of the amount of punitive damages.¹¹⁹ In *Browning-Ferris*, the Supreme Court examined proper appellate review of the excessiveness of punitive damages awarded by a jury.¹²⁰ Although the Court sanctioned appellate review of lower court decisions as to the appropriateness of punitive damages awards, the Court stated: "It is not our role to review directly the award for excessiveness, or to substitute our judgment for that of the jury. . . . In reviewing an award of punitive damages, the role of the district court is to determine . . . whether a new trial or remittitur should be ordered."¹²¹ Thus, according to the Supreme Court, even though determining whether a punitive damages award is excessive is a legal function, the reassessment of the appropriate award remains a fundamental element of the common-law right to a trial by jury.¹²² The jury's well-established role in the assessment of punitive damages was articulated in *Day v. Woodworth*:¹²³

It is a well-established principle of the common law, that in . . . all actions on the case for torts, a jury may inflict what are

A. 461, 464 (1903) (explaining that when punitive damages are warranted a court can "on motion for a new trial, afford protection against excessive verdicts, but if the circumstances be such as may entitle a plaintiff to such damages, it is the duty of the Court to submit that question to the jury"); *Fraidin v. Weitzman*, 93 Md. App. 168, 217, 611 A.2d 1046, 1070 (1992) (vacating excessive punitive damages award and remanding case to trial court for reconsideration of remittitur, or if rejected, a new trial).

115. *Alexander*, 88 Md. App. at 722-23, 596 A.2d at 711-12.

116. *Id.* at 722, 596 A.2d at 711.

117. *Defender Indus., Inc. v. Northwestern Mut. Life Ins. Co.*, 938 F.2d 502, 506 (4th Cir. 1991).

118. *Id.* (citing *Browning-Ferris Indus. v. Kelco Disposal, Inc.*, 492 U.S. 257 (1989); *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1 (1991)).

119. *Id.*

120. *Browning-Ferris*, 492 U.S. at 278-79.

121. *Id.*

122. *Id.*; see also *Defender Industries*, 938 F.2d at 506.

123. 54 U.S. (13 How.) 363 (1852).

called exemplary, punitive, or vindictive damages upon a defendant

This has been always left to the discretion of the jury, as the degree of punishment to be thus inflicted must depend on the peculiar circumstances of each case.¹²⁴

Based on these opinions, the traditional role of the jury in assessing punitive damages awards, even after the awards are found excessive, is well established under both the United States and Maryland common law.

The *Bowden* majority justified usurpation of a jury determination of punitive damages when an initial award is found excessive by comparing the court's function in reducing the award to the function of a judgment notwithstanding the verdict.¹²⁵ This comparison is illogical. When a court grants a JNOV, it concludes that the evidence does not support the verdict and nullifies the judgment.¹²⁶ A JNOV is analogous to a court's determination that a punitive damages award exceeds legal limits.¹²⁷ Both are legal determinations and threshold inquiries.¹²⁸ The analogy becomes untenable, however, when it is extended to a judge's subsequent determination of what award would be appropriate. This determination is not based solely on legal princi-

124. *Id.* at 371; *see also* *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 15 (1991). The majority opinion, as well as Justice Scalia's concurrence in *Haslip*, review the long-standing tradition of punitive damages in American law. *Id.* at 15-18; *id.* at 25-28 (Scalia, J., concurring). Both opinions cite early cases supporting a jury determination of punitive damages although recognizing the possibility of appellate review where verdicts were influenced by passion, prejudice, or a clear mistake of the law or of the facts involved in the case. *Haslip*, 499 U.S. at 15-18; *id.* at 25-28 (Scalia, J., concurring); *see also, e.g.,* *Barry v. Edmunds*, 116 U.S. 550, 565 (1886) ("[N]othing is better settled than . . . in . . . other actions for torts where no precise rule of law fixes the recoverable damages, it is the peculiar function of the jury to determine the amount by their verdict."); THEODORE SEDGWICK, *MEASURE OF DAMAGES* 537 n.1 (Henry Dwight Sedgwick ed., 4th ed. 1868) ("[I]n cases proper for exemplary damages, it would seem impracticable to set any bounds to the discretion of the jury, though in cases where the wrong done . . . is greatly disproportioned to the amount of the verdict, the court may exercise the power it always possesses to grant a new trial for excessive damages.").

125. *Bowden*, 350 Md. at 47, 710 A.2d at 288.

126. *See* *Impala Platinum Ltd. v. Impala Sales (U.S.A.), Inc.*, 283 Md. 296, 326, 389 A.2d 887, 904-05 (1978) (explaining that a motion JNOV tests the legal sufficiency of evidence); *Goldman, Skeen & Wadler, P.A. v. Cooper, Beckman & Tuerk, L.L.P.*, 122 Md. App. 29, 64-65, 712 A.2d 1, 18 (1998) (stating that to resolve a motion for JNOV, the court should evaluate the legal sufficiency of the evidence and strike the jury's verdict should the evidence prove inadequate to support the jury's verdict).

127. *See Bowden*, 350 Md. at 60-61, 710 A.2d at 295 (Bell, C.J., dissenting and concurring) (illustrating that courts serve a threshold function when they review a verdict for excessiveness and evaluate sufficiency of evidence for a motion JNOV).

128. *Id.* at 60, 710 A.2d at 295.

ples; rather, it is limited by legal principles.¹²⁹ Under Maryland and federal law, litigants are guaranteed that a jury, using a permissible level of discretion, will determine whether a defendant's conduct merits punitive damages and what level of damages accomplishes goals of deterrence and punishment.¹³⁰ This level of damages depends on the specific circumstances of each case.¹³¹ Consequently, absent express constraints, such as a cap or statutory limitations, the assessment of a punitive damages award is a factual determination reserved without exception for the jury.¹³² The Court of Appeals decision in *Murphy v. Edmonds*¹³³ requires a conclusion that a trial judge should not assume the jury's role in determining an acceptable amount of punitive damages. Although the Court of Appeals held that a statutory cap on noneconomic damages in tort actions did not violate the right to a jury trial, the court stressed that:

[i]f the General Assembly had provided . . . that the trial judge, rather than the jury, should determine the amount of noneconomic damages or the amount of noneconomic damages in excess of \$350,000, a substantial issue concerning the validity of the statute would be presented. The General Assembly, however, did not attempt to transfer what is traditionally a jury function to the trial judge.¹³⁴

It is evident that judicial usurpation of the right to a jury determination of damages is inconsistent with the prior understanding of the Article 23 right to a trial by jury as emphasized in *Edmonds*.¹³⁵ Furthermore, while similar caps or legislative provisions limiting punitive

129. See *Browning-Ferris Indus. v. Kelco Disposal, Inc.*, 492 U.S. 257, 279 (1989) (stating that the role of the court in reviewing punitive damages awards is to assess whether the award is within the legal limits established by state law and to determine whether a new trial or remittitur should be mandated).

130. See *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 15-16 (1991) (discussing the extensive common-law tradition of leaving the assessment of punitive damages awards to the discretion of the jury); *Alexander & Alexander, Inc. v. B. Dixon Evander & Assoc., Inc.*, 88 Md. App. 672, 714-16, 596 A.2d 687, 708-10 (1991) (discussing common-law principles underlying a jury determination of punitive damages).

131. See *TXO Prod. Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 457 (1993) (plurality opinion) (describing the difficulty involved in comparing punitive damages awards because facts and circumstances unique to each case affect the jury's assessment); *Haslip*, 499 U.S. at 16 ("[Punitive damages awards have] been always left to the discretion of the jury, as the degree of punishment to be thus inflicted must depend on the peculiar circumstances of each case." (internal quotation marks omitted) (quoting *Day v. Woodworth*, 54 U.S. (13 How.) 363, 371 (1852))).

132. *Bowden*, 350 Md. at 63, 710 A.2d at 296 (Bell, C.J., dissenting and concurring).

133. 325 Md. 342, 601 A.2d 102 (1992).

134. *Id.* at 373, 601 A.2d at 117.

135. *Id.* (stating that transfer of the traditional jury function of assessing damages to a trial judge would raise a serious issue concerning the right to a jury trial).

damages awards would likely comport with constitutional requirements under *Edmonds*, unfettered judicial discretion in assessing damages after an initial award is found excessive “flies in the face of Article 23” providing that the “right of trial by jury of all issues of fact in Court proceedings . . . shall be inviolably preserved.”¹³⁶

c. Ramifications of Judicial Power to Assess Punitive Damages.—

In the spirit and tradition underlying Maryland common-law rights, judges should be prohibited from assessing punitive damages awards. It is well established under Maryland law that punitive damages serve to punish egregious misconduct and to deter similar behavior in the future.¹³⁷ Moreover, the assessment of a punitive damages award is not formulaic; to the contrary, it involves discretionary calculations and consideration of a variety of factors.¹³⁸ The discretionary nature of punitive damages assessment troubles many advocates for tort reform who feel that judicial determination of punitive damages awards are necessary to curtail punitive damages that are awarded in a “random and capricious manner.”¹³⁹ While inappropriate and excessive punitive damages awards present problems that need to be addressed, usurpation of the jury’s traditional role in assessing punitive damages is not the solution.

As noted above, determination of punitive damages awards by a jury has long been considered an inviolable right under the Maryland and federal constitutions.¹⁴⁰ The existence of this long-standing tradition reflects the notion that a jury is best suited to determine whether certain conduct violates society’s standards of decency and to ascertain the extent to which certain conduct should be condemned and

136. *Bowden*, 350 Md. at 61, 710 A.2d at 295 (Bell, C.J., dissenting and concurring) (omission in original) (quoting MD. CODE ANN., CONST., DECL. OF RTS. art. 23, cl. 2 (1981 & Supp. 1998)). Several states have legislatively imposed limits whereby the amount of a punitive damages award may not exceed three times the amount of the plaintiff’s actual or compensatory damages. See, e.g., *Gordon v. State*, 608 So. 2d 800, 802 (Fla. 1992) (per curiam) (holding that a Florida statute limiting punitive damages did not violate the right to trial by jury); *Bagley v. Shortt*, 410 S.E.2d 738, 739 (Ga. 1991) (rejecting constitutional challenge to Georgia statute limiting punitive damages); *Seminole Pipeline Co. v. Broad Leaf Partners, Inc.*, 979 S.W.2d 730, 758 (Tex. App. 1998, no writ) (holding that Texas statutory cap on punitive damages was permissible under state constitution).

137. *Bowden*, 350 Md. at 22, 710 A.2d at 276.

138. See *supra* note 38 (delineating factors to evaluate when determining the availability and amount of punitive damages).

139. See Dan Quayle, *Civil Justice Reform*, 41 AM. U. L. REV. 559, 564-65 (1992) (advocating for punitive damages reform to “reduce[] the threat of runaway jury verdicts, promote[] settlements, and increase[] certainty in commercial transactions by establishing reasonable boundaries for awards”).

140. See *supra* note 114 and accompanying text.

punished.¹⁴¹ Thus, punitive damages awards should reflect values and established norms in our communities and indicate the level of reprehensibility associated with the condemned behavior.¹⁴² These values and norms are best manifested in a jury.¹⁴³ Bias is less likely to occur when multiple jurors contribute to the determination of a damages award.¹⁴⁴ Although judges must play a neutral and unbiased role in the judicial process,¹⁴⁵ political pressures associated with reelection and appointment to an appellate court may influence the amount of punitive damages assessed by a judge against a certain defendant.¹⁴⁶

Some writers suggest that jury confusion often results in excessive punitive damages verdicts because jurors misunderstand instructions provided to them.¹⁴⁷ Rather than commandeer the traditional role of the jury in computing punitive damages, advocates for reform should strive to clarify jury instructions so that the purpose and criteria for punitive damages awards are clearly conveyed.¹⁴⁸

Legislative limits may also resolve the dispute surrounding assessment of punitive damages. Statutory limits provide reasonable constraints determined by the legislature, thereby eliminating broad judicial discretion regarding appropriate damages awards.¹⁴⁹ Thus,

141. See *supra* notes 130-132 and accompanying text (discussing the traditional role of the jury in deciding whether punitive damages should be awarded under particular circumstances of each case).

142. See generally Alan Howard Scheiner, Note, *Judicial Assessment of Punitive Damages, the Seventh Amendment, and the Politics of Jury Power*, 91 COLUM. L. REV. 142, 145 (1991) (arguing that discretionary punitive damages must be assessed by a jury to preserve the Seventh Amendment's commitment to a representational and participatory democracy).

143. See *id.* ("Because the likelihood of punitive damages determines how much protection the people get from violations of their nominal legal rights, sincere commitment to popular government through juries requires jury assessment of punitive damages.").

144. See Stephen A. Saltzburg, *Improving the Quality of Jury Decisionmaking*, in VERDICT: ASSESSING THE CIVIL JURY SYSTEM 341, 344 (Robert E. Litan ed., 1993) (arguing that biases or prejudices by individual jurors can be neutralized by other jurors; however, the individual bias of a judge cannot be counterbalanced in the same manner).

145. See MD. RULE 3-505 (authorizing recusal of judge who is unable to provide a fair and impartial trial); see also 28 U.S.C. § 455a (1994) ("Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.").

146. See Scheiner, *supra* note 142, at 159, 168-69 (emphasizing that jurors do not have to consider political ramifications of their decisions as do judges).

147. See Lisa M. Sharkey, Comment, *Judge or Jury: Who Should Assess Punitive Damages?*, 64 U. CIN. L. REV. 1089, 1132 (1996) (contending that judges understand the significance and goals of punitive damages better than juries and that jury awards often reflect confusion).

148. See *Alexander & Alexander, Inc. v. B. Dixon Evander & Assoc., Inc.*, 88 Md. App. 672, 715-16, 596 A.2d 687, 708-10 (1991) (discussing principles governing punitive damages awards and their use as jury instructions).

149. See, e.g., *Murphy v. Edmonds*, 325 Md. 342, 373, 601 A.2d 102, 117 (1992) (demonstrating that a legislative cap on noneconomic damages removes the possibility of unfettered judicial discretion to reduce damages awards when they are in excess of \$350,000).

the jury retains its role in ascertaining punitive damages awards because specific, codified legal limits prevent a judge from substituting his personal judgment for that of the jury.¹⁵⁰ Statutory limits would address concerns surrounding excessive damages awards without abrogating the traditional function of the jury in assessing damages awards.¹⁵¹

As noted earlier, several federal appellate courts have reduced excessive punitive damages awards without providing the option of a new trial, reasoning that the interest in judicial economy outweighed potential injustice experienced by litigants.¹⁵² Again, while problems associated with our overburdened judicial system need attention, fundamental and traditional rights enjoyed for years in Maryland and in the federal court system should not be sacrificed for the sake of judicial economy. Our judicial system should provide a forum for disputes where a jury of peers renders judgment and where rights can be vindicated. Vindication of rights is particularly significant in cases where punitive damages are available because defendants have behaved in an egregious and heinous manner.¹⁵³ Interests in conserving resources and saving time and money should not outweigh a plaintiff's interest in securing justice in a public forum for an egregious wrong. If the law permits judges to substitute their judgment for that of a jury and to reduce punitive damages awards without any guidance from the legislature, plaintiffs may be reluctant to bring costly and time consuming lawsuits.¹⁵⁴ Furthermore, plaintiffs who decide to initiate actions as a result of a defendant's outrageous misconduct might choose to settle early instead of proceeding to trial.¹⁵⁵ Such a result would undermine an important goal of our justice system because public vindication of rights would not occur and the conduct of many

150. See *id.* (maintaining jury's role in determining noneconomic damages while imposing a cap of \$350,000 determined by the legislature, not trial judges).

151. See *id.*; see also *supra* note 136 (listing state courts upholding statutes that proscribe punitive damages awards in excess of three times a plaintiff's compensatory damages award).

152. See *supra* notes 67-71 (identifying specific examples of judicial reduction of a punitive damages award without providing the option of a new trial).

153. See Scheiner, *supra* note 142, at 225 ("Because punitive damages are . . . necessary for the full vindication of the rights of the relatively poor and powerless against their economic and political superiors, allegiance to the values embodied in the seventh amendment requires jury assessment of these awards.").

154. See Sharkey, *supra* note 147, at 1135 (discussing the possibility that plaintiffs will settle early or forego bringing suit where reduction of a punitive damages award is likely).

155. See Scheiner, *supra* note 142, at 194-95 ("The expected verdict controls decisions to commit a tort . . . , to bring suit, to settle . . . and perhaps most importantly, the availability, quantity, and quality of plaintiffs' legal services."); Sharkey, *supra* note 147, at 1135.

culpable and deplorable defendants would go unpunished by the community.

Two final noteworthy ramifications of the Court of Appeals decision in *Bowden* include inconsistent judicial treatment of punitive damages awards deemed excessive and potential forum shopping. The last sentence in the majority opinion indicates that a court, after finding that a punitive damages award is excessive, may grant a new trial, but is not required to do so under the Maryland Constitution.¹⁵⁶ This holding will likely result in inconsistent treatment of similarly situated plaintiffs. Depending on the particular judge, some plaintiffs whose initial awards are deemed excessive will be afforded another opportunity to receive a jury determination of damages while others will be forced to accept a judicial reduction.¹⁵⁷ Arbitrary and varying treatment of plaintiffs seeking punitive damages awards will create unpredictability that could persuade plaintiffs to settle out of court when they would otherwise seek a jury determination of punitive damages.

Forum shopping is also a potential consequence that is not discussed by the court in *Bowden*. In light of the Fourth Circuit's decision in *Defender Industries*, potential litigants could circumvent *Bowden* by filing in federal court.¹⁵⁸ Assuming jurisdictional requirements are established, plaintiffs would benefit from the application of substantive Maryland law while enjoying the procedural guarantees of the Seventh Amendment.¹⁵⁹ This would aggravate an already burdened federal court system and would undermine goals promoting judicial economy in the federal system.¹⁶⁰

5. *Conclusion.*—The Court of Appeals opinion in *Bowden* illogically interprets otherwise instructive Supreme Court precedent concerning judicial review of punitive damages awards. The majority ignores the rich and significant tradition involving the right to damages assessment by a jury that is embodied in Maryland common law.¹⁶¹ *Bowden* undermines Maryland common-law tradition and renders the right to a trial by jury meaningless in cases where a defend-

156. *Bowden*, 350 Md. at 47, 710 A.2d at 288.

157. *See id.* (holding that the court has discretion to grant a new trial or to reduce an excessive verdict itself).

158. *See* *Defender Indus., Inc. v. Northwestern Mut. Life Ins. Co.*, 938 F.2d 502, 507 (4th Cir. 1991) (holding that under the Seventh Amendment, a court must give a plaintiff the option of a new trial when it deems a punitive damages award excessive).

159. *See id.*

160. *See supra* notes 67-71 and accompanying text (demonstrating that concern for judicial economy is often the basis for a decision not to grant a new trial when a court finds a verdict excessive).

161. *See supra* note 48 and accompanying text.

ant's behavior is most worthy of condemnation by representatives of the community. While judicial economy and grossly excessive damages awards are concerns that merit attention, the common-law right to a jury by one's peers should not be renounced when other resolutions exist. Statutory limits on punitive damages awards would curtail extreme awards, yet preserve the jury's role in assessing damages.¹⁶² Although judges would be authorized under statute to reduce awards within the legislatively determined constraints, they would not be permitted to substitute their assessment of damages for that of the jury.¹⁶³ Accordingly, an emphasis on statutory limits would better reflect the spirit and tradition of Maryland law.

BRIDGET E. CAREY

B. Raising the Standard for Punitive Damages: Undermining Traditional Purposes and Insulating Reprehensible Conduct

In *Le Marc's Management Corp. v. Valentin*,¹⁶⁴ the Court of Appeals held that to recover punitive damages in an action for defamation, a plaintiff must prove, by clear and convincing evidence, that the defendant had actual knowledge that the defamatory statement was false.¹⁶⁵ The court also concluded that punitive damages are not recoverable in a defamation action where the plaintiff proves only that the defendant acted with "reckless disregard" for the truth.¹⁶⁶ Overruling past precedent, this decision significantly raised the standard for awarding punitive damages in defamation actions in particular, and in intentional tort actions generally.¹⁶⁷

The new standard articulated in *Le Marc's* renders punitive damages virtually unattainable in a defamation case in Maryland. Moreover, the decision disserves the basic purposes of punitive damages. By requiring a defendant to prove actual malice in the sense of actual

162. See *supra* notes 133-136 (discussing jury's role in assessing damages up to a legislatively imposed limit).

163. See *supra* notes 149-150 and accompanying text (discussing the function of legislative caps in limiting damages awards while preserving the jury's role in determining damages awards).

164. 349 Md. 645, 709 A.2d 1222 (1998).

165. *Id.* at 653, 709 A.2d at 1226; see also *id.* at 656, 709 A.2d at 1228 (setting forth the "clear and convincing" requirement).

166. *Id.* at 655, 709 A.2d at 1227.

167. See *id.* at 658, 709 A.2d at 1229 (Bell, C.J., dissenting) ("Today, citing *Zenobia* and its progeny, and, in particular *Ellerin*, the majority overrules these cases and replaces the standard they announced with one requiring that the plaintiff establish the defendant's actual knowledge of the falsity of the defamatory statement."). For a discussion of *Zenobia* and *Ellerin*, see, respectively, *infra* notes 260-275, 276-283 and accompanying text.

knowledge, the Court of Appeals has significantly reduced the capacity of punitive damages to punish and deter misconduct. The result is that the Court of Appeals has established one of the most stringent punitive damage requirements in the nation,¹⁶⁸ and left Maryland with a standard that shields reprehensible conduct.

1. *The Case.*—On September 18, 1989, Sovran Bank of Maryland (Bank) terminated teller-trainee Francisco Valentin for falsifying his employment application.¹⁶⁹ The termination stemmed from Valentin's former employment with Le Marc's Fifth Avenue Cards, Inc., a Hallmark Card store located in New York City and owned by Le Marc's Management Corporation.¹⁷⁰ Valentin began to work as a stock room clerk for Le Marc's in late 1987.¹⁷¹ After deciding to leave Le Marc's, on June 6, 1988, Valentin submitted a letter of resignation to his manager.¹⁷²

Valentin moved to Maryland and eventually was hired by Sovran Bank as a teller-trainee.¹⁷³ Sovran Bank, with Valentin's permission, requested references from Valentin's former employers, including Le Marc's.¹⁷⁴ Robert Sauer, Le Marc's corporate administrator, returned the Bank's reference form and indicated that Valentin had been "terminated due to pilferage."¹⁷⁵ The Bank then suspended Valentin and gave him four days to clear his record, or else permanently lose his job.¹⁷⁶

Valentin immediately telephoned Sauer and the next day traveled to New York to meet with him.¹⁷⁷ Prior to meeting with Valentin,

168. See *infra* notes 329-343 and accompanying text (discussing varying punitive damages standards).

169. *Le Marc's*, 349 Md. at 648, 709 A.2d at 1224. Sovran Bank also informed Valentin that he no longer was eligible for future employment with the Bank. *Id.*

170. *Id.* at 646, 709 A.2d at 1223. This Note refers to both corporations collectively as "Le Marc's."

171. *Id.*

172. *Id.* at 647, 709 A.2d at 1223. Although Valentin testified that he submitted a letter to his manager, the letter was neither introduced in evidence nor even found. *Id.* Le Marc's corporate administrator testified that the letter was not in Valentin's personnel file; Valentin testified that he had not kept a copy. *Id.*

173. *Id.*

174. *Id.*

175. *Id.* Although this assertion turned out to be false, see *infra* text accompanying note 178, Le Marc's had suspected employee theft, and had given polygraph tests to the store employees in May 1989. *Le Marc's*, 349 Md. at 647, 709 A.2d at 1223. The polygraph examiner told Sauer that the results were difficult to interpret, due to the limited ability of Valentin (whose first language was Spanish) to speak English, but that he believed Valentin "was holding back information." *Id.* (internal quotation marks omitted).

176. *Le Marc's*, 349 Md. at 647, 709 A.2d at 1223.

177. *Id.* at 647, 709 A.2d at 1223-24.

Sauer reviewed Valentin's employment file and determined that he (Sauer) had erroneously informed Sovran Bank that Valentin had been fired for theft.¹⁷⁸ Sauer, however, also questioned Valentin as to his knowledge of employee thefts during his tenure with Le Marc's.¹⁷⁹ Sauer drafted a document which indicated that, although Valentin himself never stole merchandise, he discovered other employees doing so and "did not want to say anything to [his] manager about [this] . . . situation[]."¹⁸⁰ Believing that his record would be cleared, Valentin signed the document and returned to Maryland.¹⁸¹

Sauer mailed a letter to Sovran Bank to correct the original erroneous reference, and attached the document that Valentin had signed.¹⁸² Shelia Balog, a personnel department employee for the Bank, testified that Sauer's "letter and the attached document cast doubt on Valentin's 'credibility,' indicated that he was 'covering [something] up,' and had told the Bank a 'half truth.'"¹⁸³ The Bank then fired Valentin for falsifying his employment records.¹⁸⁴

On August 17, 1990, Valentin filed a defamation action against Le Marc's in the Circuit Court for Montgomery County.¹⁸⁵ The jury found that Le Marc's had in fact defamed Valentin, and awarded him \$25,000 in compensatory damages and \$130,000 in punitive damages.¹⁸⁶ After granting Le Marc's motion for remittitur, the trial court reduced the punitive damages to \$75,000.¹⁸⁷ On appeal, the Court of Special Appeals found that the trial court's punitive damages jury instruction was inadequate because it failed to articulate that the proper

178. *Id.* at 647, 709 A.2d at 1224.

179. *Id.* at 648, 709 A.2d at 1224. Sauer also discovered that Valentin's personnel file contained notes indicating that Valentin had told his manager that he suspected some of his fellow employees were stealing merchandise. *Id.*; see also *supra* note 175 (discussing the polygraph test previously administered to Valentin).

180. *Le Marc's*, 349 Md. at 648, 709 A.2d at 1224 (second and third alteration and ellipsis in original) (internal quotation marks omitted).

181. *Id.*

182. *Id.*

183. *Id.* (alteration in original). The letter Sauer sent the bank to correct the original erroneous reference stated in pertinent part: "Thus [Valentin's] reason for termination was stated incorrectly due to human error. Our physical file on [Valentin] does not reflect a pilferage situation directly with him. Please strike from the record this reason for termination." *Id.*

184. *Id.*

185. *Id.* at 649, 709 A.2d at 1224.

186. *Id.*

187. *Id.*

standard for such an award is that of "clear and convincing" evidence.¹⁸⁸

On remand, the trial court considered only the issue of the punitive damages award.¹⁸⁹ Following the Court of Special Appeals instruction, the trial court instructed the jury as to the clear and convincing standard of proof, and added the following instruction concerning malice, the legal sufficiency of which the Court of Appeals later addressed:

Malice exists, one, when the person making the statement deliberately lies or makes the statement with knowledge that it is false or with reckless disregard as to its truth or falsity or, two, when the person making the statement had an obvious reason to distrust either the accuracy of the statement or the source from which the person learned of the statement or, finally, item three, when the statement is invented by the person making it or is so inherently improbable that only a reckless person would say, write, or print it.¹⁹⁰

The jury subsequently awarded Valentin \$700,000 in punitive damages.¹⁹¹ During Le Marc's second appeal to the Court of Special Appeals, the Court of Appeals issued a writ of certiorari to determine "the appropriate standard under Maryland common law[] for the allowance of punitive damages in defamation actions."¹⁹²

2. *Legal Background.*—

a. Defamation.—In Maryland, many of the changes in the law of defamation¹⁹³ came about as a result of the United States

188. *Id.* The Court of Special Appeals decision was unreported. See 101 Md. App. 728 (1993) (listing unreported opinions).

189. *Le Marc's*, 349 Md. at 649, 709 A.2d at 1224.

190. *Id.* at 649, 709 A.2d at 1224-25; see also *id.* at 656, 709 A.2d at 1228 (noting that "the trial court [was] guided somewhat by the overly broad 'reckless disregard' standard for punitive damages set forth in our earlier defamation cases").

191. *Id.* at 649, 709 A.2d at 1225.

192. *Id.* at 646, 709 A.2d at 1223.

193. Defamation is composed of both libel and slander. See 1 JAMES D. GHIARDI & JOHN K. KIRCHER, PUNITIVE DAMAGES: LAW AND PRACTICE § 13.03, at 7 (1998) ("Slander is concerned with oral defamation while libel is involved with written defamation.").

Supreme Court's decisions in *New York Times Co. v. Sullivan*,¹⁹⁴ *Curtis Publishing Co. v. Butts*,¹⁹⁵ and *Gertz v. Robert Welch, Inc.*¹⁹⁶

In *New York Times*, an elected official from Alabama brought suit in state court alleging that he had been defamed by an advertisement printed in the *New York Times*.¹⁹⁷ The advertisement contained false information regarding alleged police activity directed towards students participating in a civil rights demonstration.¹⁹⁸ The Supreme Court reasoned that, when public officials were involved, the usual defense of truth to a defamation action would be insufficient to protect a speaker's First Amendment right to engage in vigorous public debate.¹⁹⁹ Thus, the Supreme Court held that a public official suing for damages for a defamatory statement regarding his official conduct could only recover punitive damages if he proved that "the statement was made with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not."²⁰⁰ Furthermore, the Court indicated that proof of actual malice must be of "convincing clarity" in order to satisfy the constitutional standard applicable to defamation actions brought by public officials in response to criticism of their official conduct.²⁰¹ Finally, the Court asserted that evidence supporting only a finding of negligence in failing to discover the falsity of a statement would be insufficient to show the recklessness presumed by the actual malice standard.²⁰²

Three years later, in *Curtis Publishing Co. v. Butts*,²⁰³ a plurality of the Supreme Court extended its holding in *New York Times* from public officials to public figures generally.²⁰⁴ In *Curtis*, a university ath-

194. 376 U.S. 254 (1964); see *Telnikoff v. Matusevitch*, 347 Md. 561, 590, 702 A.2d 230, 244-45 (1997) (noting that, before *New York Times* and its progeny, "numerous English common law principles governing libel and slander actions were routinely applied in Maryland defamation cases without any consideration or mention of the constitutional free press clauses or the strong public policy favoring freedom of the press" (citing *Domchick v. Greenbelt Consumer Servs.*, 200 Md. 36, 45-49, 87 A.2d 831, 836-38 (1952))).

195. 388 U.S. 130 (1967) (plurality opinion).

196. 418 U.S. 323 (1974).

197. See *New York Times*, 376 U.S. at 256-59. Although Sullivan, the Commissioner of Public Affairs for Montgomery, Alabama, was not mentioned directly in the advertisement, he alleged that the word "police," as used in certain parts of the advertisement, referred to him, and that the allegations of improper police conduct would be imputed to him. *Id.* at 258.

198. *Id.* at 256.

199. *Id.* at 279.

200. *Id.* at 279-80.

201. *Id.* at 285-86.

202. *Id.* at 287-88.

203. 388 U.S. 130 (1967) (plurality opinion).

204. *Id.* at 155. See generally *id.* at 163-64 (Warren, C.J., concurring) (defining public figures as persons who are "intimately involved in the resolution of important public ques-

letic director alleged that he had been defamed by an article which claimed that he had, prior to a game, given an opposing football team his own team's plays, defensive patterns, and other "significant secrets."²⁰⁵ In extending the *New York Times* "actual malice" standard to public figures, the *Curtis* plurality reasoned that the First Amendment required a higher degree of protection not only for criticism of public officials, but also for the "dissemination of the individual's opinions on matters of public interest."²⁰⁶ Thus, the plurality found that a "'public figure' who is not a public official may also recover damages for a defamatory falsehood whose substance makes substantial danger to reputation apparent, on a showing of highly unreasonable conduct constituting an extreme departure from the standards of investigation and reporting ordinarily adhered to by responsible publishers."²⁰⁷

In *Gertz v. Robert Welch, Inc.*,²⁰⁸ the Supreme Court held that in a defamation case involving a person who was neither a public official nor a public figure, the *New York Times* "actual malice" standard did not apply.²⁰⁹ The *Gertz* Court decided that it would be left to the states individually to decide the standard for liability in defamation actions against private individuals.²¹⁰ The Court also indicated that in a defamation action involving a private person, a plaintiff cannot recover compensatory damages unless he can at least prove negligence.²¹¹ Finally, the Court held that to recover punitive damages in such a case, the plaintiff is required to prove, by clear and convincing

tions or, [those who] by reason of their fame, shape events in areas of concern to society at large").

205. *Curtis Publ'g*, 388 U.S. at 136 (plurality opinion).

206. *Id.* at 149; *see also id.* at 150 ("The guarantees of freedom of speech and press were . . . designed to prevent . . . 'any action of the government by means of which it might prevent such free and general discussion of public matters as seems absolutely essential . . .'" (quoting 2 THOMAS M. COOLEY, CONSTITUTIONAL LIMITATIONS 886 (8th ed. 1927))).

207. *Id.* at 155.

208. 418 U.S. 323 (1974).

209. *Id.* at 346-47.

210. *Id.* at 347. The Court reasoned that this approach "recognizes the strength of the legitimate state interest in compensating private individuals for wrongful injury to reputation, yet shields the press and broadcast media from the rigors of strict liability for defamation." *Id.* at 348. *But see id.* at 370 (White, J., dissenting) (stating that this approach had the partial effect of "deprecating the reputation interest of ordinary citizens and rendering them powerless to protect themselves").

211. *See Gertz*, 418 U.S. at 347 (stating that "so long as they do not impose liability without fault, the States may define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehood injurious to a private individual"). By eliminating strict liability, the Court left states free to choose between the "actual malice" standard of *New York Times* or a negligence standard. *See supra* note 200 and accompanying text (discussing the *New York Times* "actual malice" standard).

evidence, that the defamatory statements were made with "knowledge of falsity or reckless disregard for the truth,"²¹² i.e., actual malice.

Following the Supreme Court's decisions in *New York Times*, *Curtis Publishing* and *Gertz*, the Maryland Court of Appeals substantially changed Maryland's common law of defamation.²¹³ In *Jacron Sales Co. v. Sindorf*,²¹⁴ the Court of Appeals, noting the "compelling need for consistency and simplicity in the law of defamation,"²¹⁵ applied the *Gertz* principle to a private person regardless of whether the action involved a media or non-media defendant, and regardless of whether the subject matter was one of public or private concern.²¹⁶ Under *Jacron*, in any action where the plaintiff is not a public official or public figure,²¹⁷ the plaintiff must establish that the defendant was at least negligent in failing to ascertain the falsity and the defamatory nature of his statements.²¹⁸ As to the quantum of proof necessary to establish the fault of the defendant, the *Jacron* court specifically rejected the "clear and convincing" test "applied in the public-official and public-figure sphere."²¹⁹ Instead, the court held that in "purely private" defamation cases, proof by a preponderance of the evidence was sufficient.²²⁰ Furthermore, the court held that although actual damages are recoverable, a plaintiff cannot recover punitive damages in any defamation action unless he establishes liability "under the more demanding *New York Times* standard of knowing falsity or reckless disregard for the truth."²²¹

In *General Motors Corp. v. Piskor*,²²² the Court of Appeals, reaffirming its holding in *Jacron*, clarified that a plaintiff may not recover "pre-

212. *Gertz*, 418 U.S. at 349.

213. See *Telnikoff v. Matusevitch*, 347 Md. 561, 593, 702 A.2d 230, 246 (1997) (noting that, after these opinions, the Court of Appeals "substantially changed the Maryland common law regarding defamation actions even in areas where the changes were not mandated by the First Amendment and Article 40 of the Maryland Declaration of Rights" (citations omitted)).

214. 276 Md. 580, 350 A.2d 688 (1976).

215. *Id.* at 593, 350 A.2d at 696.

216. See *id.* at 592, 350 A.2d at 695 (arguing that there is no basis for distinguishing between media and non-media cases because "[i]ssues of public interest may equally be discussed in media and non-media contexts").

217. The *Jacron* court referred to such cases as "purely private defamation." *Id.* at 596, 350 A.2d at 697.

218. See *id.* at 594-96, 350 A.2d at 696-97 (noting that, under *Gertz*, while the court cannot adopt a strict liability standard, it can adopt a negligence standard or a more stringent one, and adopting the former in cases of "purely private defamation").

219. *Id.* at 597, 350 A.2d at 698.

220. *Id.*

221. *Id.* at 601, 350 A.2d at 700.

222. 277 Md. 165, 352 A.2d 810 (1976).

sumed or punitive damages unless he meets the *New York Times* standard of knowing falsity or reckless disregard for the truth.”²²³ In *Piskor*, a line worker sued General Motors for slander, assault, and false imprisonment after he was detained and searched by security guards for suspicion of theft.²²⁴ A jury awarded the employee compensatory damages totaling \$1500 and punitive damages in the amount of \$25,000.²²⁵ The Court of Special Appeals affirmed the award, finding that “there was sufficient evidence . . . to support the verdict for punitive damages.”²²⁶ The Court of Appeals granted certiorari and reaffirmed its holding in *Jacron* that, under *Gertz*, a State may not permit recovery of punitive damages unless the *New York Times* test of “knowing or reckless falsity” is met.²²⁷ The *Piskor* court reversed the award of punitive damages because the jury found General Motors liable on all three claims, but did not establish to what extent the punitive damages were linked to slander.²²⁸ The court remanded the case with the instruction that *Piskor* could recover punitive damages only by meeting “the *New York Times* standard of knowing falsity or reckless disregard for the truth.”²²⁹

In *Marchesi v. Franchino*,²³⁰ the Court of Appeals clarified the standard of defamatory conduct necessary to overcome a conditional privilege and thus to warrant an award of punitive damages. In *Marchesi*, the Court of Appeals found that *Jacron* “‘not only retained the common law conditional privileges, but actually adopted the test of constitutional malice articulated in *New York Times* . . . as the exclusive standard for defeating the qualified privilege.’”²³¹ Furthermore, the court clarified that “actual malice” consists of “knowledge of falsity or reckless disregard for truth,” and that malice in the sense of “ill will” is an insufficient basis for awarding punitive damages.²³²

b. Punitive Damages.—Over the last twenty-five years, the Maryland Court of Appeals has significantly altered the appropriate

223. *Id.* at 175, 352 A.2d at 817.

224. *Id.* at 166-67, 352 A.2d at 812.

225. *Id.* at 167, 352 A.2d at 812.

226. *Id.* at 170, 352 A.2d at 814.

227. *Id.* at 174, 352 A.2d at 816.

228. *Id.* at 175, 352 A.2d at 817.

229. *Id.*

230. 283 Md. 131, 387 A.2d 1129 (1978).

231. *Id.* at 135 n.5, 387 A.2d at 1131 n.5 (quoting Comment, *The Maryland Court of Appeals: State Defamation Law in the Wake of Gertz v. Robert Welch, Inc.*, 36 MD. L. REV. 622, 647 n.161 (1977)).

232. See *id.* at 138-39, 387 A.2d at 1133 (noting that “ill-will or bad motives towards the plaintiff are not elements of the *New York Times* standard” (citations omitted)).

standard for awarding punitive damages.²³³ Although the court first developed a somewhat more lenient standard under which punitive damage awards were permissible upon a showing of implied malice,²³⁴ the court later shifted to a significantly stricter standard, both of actual malice itself²³⁵ and the type of proof necessary to show actual malice,²³⁶ prior to its decision in *Le Marc*'s. During this time, the court also distinguished torts simply from torts arising out of a contractual relationship in considering whether an award of punitive damages could be made, but then overruled this distinction.²³⁷

In *Davis v. Gordon*,²³⁸ the Court of Appeals held that punitive damages are an extraordinary remedy, to be awarded only when the defendant acted with "an element of fraud, or malice, or evil intent, or oppression entering into and forming part of the wrongful act."²³⁹ The court clarified that negligence alone would not support an award of punitive damages because "punitive damages are awarded as a punishment for the evil motive or intent with which the act is done."²⁴⁰

The court expanded the *Davis* decision in *Smith v. Gray Concrete Pipe Co.*²⁴¹ The *Smith* court found that the plaintiff in an automobile accident could recover punitive damages by showing that the defendant operated his motor vehicle with "a wanton or reckless disregard for human life" and with knowledge of the dangers and risks of such conduct, because this state of mind constituted the equivalent of malice necessary to support such an award.²⁴² By defining reckless disregard for human life as "such conduct as would carry an *implication* of malice or as conduct from which one would draw a *necessary inference* of malice,"²⁴³ the court extended the availability of punitive damages

233. See *supra* notes 213-232 and accompanying text (chronicling the development of punitive damages in the context of defamation in Maryland). As a preliminary matter, it is important to note that punitive damages are allowed only in tort actions, and that the plaintiff must first establish an award of compensatory damages to be entitled to punitive damages. See *Bowden v. Caldor, Inc.*, 350 Md. 4, 22, 25, 710 A.2d 267, 276, 277 (1998).

234. See *infra* note 243 and accompanying text.

235. See *infra* notes 268-271 and accompanying text.

236. See *infra* notes 272-273 and accompanying text.

237. See *infra* notes 244-255, 260 and accompanying text.

238. 183 Md. 129, 36 A.2d 699 (1944).

239. *Id.* at 133, 36 A.2d at 701 (internal quotation marks omitted) (quoting *Philadelphia, Wilmington & Baltimore R.R. Co. v. Hoeflich*, 62 Md. 300, 307 (1884)).

240. *Id.* (internal quotation marks omitted) (quoting *Hoeflich*, 62 Md. at 307).

241. 267 Md. 149, 297 A.2d 721 (1972), *overruled by* *Owens-Illinois, Inc. v. Zenobia*, 325 Md. 420, 601 A.2d 633 (1992).

242. *Id.* at 168, 297 A.2d at 731.

243. *Id.* at 167, 297 A.2d at 731 (internal quotation marks omitted) (quoting *St. Paul at Chase v. Manufacturers Life Ins.*, 262 Md. 192, 238-39, 278 A.2d 12, 34 (1971)).

to negligence actions in which the plaintiff could show either actual malice or "implied malice."

In *H&R Block, Inc. v. Testerman*,²⁴⁴ the Court of Appeals decided that *Smith's* implied malice standard did not extend to a negligence action arising out of a contractual relationship. The *Testerman* court first determined that the implied malice standard did not extend to an action arising out of a contractual relationship because the holding in *Smith* was "confined to a wanton or reckless disregard for *human life*, and to the operation of a *motor vehicle*."²⁴⁵ Second, the court determined that a showing of "actual malice"—defined as "the performance of an act without legal justification or excuse, but with an evil or rancorous motive influenced by hate, the purpose being to deliberately and willfully injure the plaintiff"²⁴⁶—was a prerequisite to recovering punitive damages in a tort claim arising out of a contractual relationship.²⁴⁷

The *Testerman* court noted that "[a]lthough the doctrine of punitive damages has been associated traditionally with the field of torts," there were a number of Maryland cases which awarded punitive damages in tort actions "arising out of contractual relationships."²⁴⁸ An award of punitive damages in such cases, however, has long required a showing of actual malice.²⁴⁹ The *Testerman* court noted that there were, not surprisingly, "only two Maryland cases in which punitive damages have been allowed for a tort arising out of a contractual relationship."²⁵⁰ In both cases, actual malice was established upon a showing of conduct "marked by an evil motive or intent."²⁵¹

The Court of Appeals refined its *Testerman* decision in *Wedeman v. City Chevrolet Co.*²⁵² The *Wedeman* court clarified that, although *Testerman* held actual malice to be necessary to recover punitive damages in a tort arising out of a contractual relationship, a tort that preceded the contractual relationship did not arise under it, so that a plaintiff could recover punitive damages in this situation under the standard of

244. 275 Md. 36, 338 A.2d 48 (1975), *overruled by Zenobia*, 325 Md. 420, 601 A.2d 633.

245. *Id.* at 47, 338 A.2d at 54.

246. *Id.* at 43, 338 A.2d at 52 (citing *Siegman v. Equitable Trust Co.*, 267 Md. 309, 314, 297 A.2d 758, 760 (1972)).

247. *Id.* at 47, 338 A.2d at 54.

248. *Id.* at 44, 338 A.2d at 52-53.

249. *Id.* at 44-45, 338 A.2d at 53 (citing *Damazo v. Washby*, 259 Md. 627, 638, 270 A.2d 814, 819 (1970)).

250. *Id.* at 45, 338 A.2d at 53 (citing *Rinaldi v. Tana*, 252 Md. 554, 250 A.2d 533 (1969); *McClung-Logan v. Thomas*, 226 Md. 136, 172 A.2d 494 (1961)).

251. *Id.* at 46, 338 A.2d at 53.

252. 278 Md. 524, 366 A.2d 7 (1976), *overruled by Owens-Illinois, Inc. v. Zenobia*, 325 Md. 420, 601 A.2d 633 (1992).

implied malice.²⁵³ Thus, the court found that no proof of actual malice was required to warrant an award of punitive damages when the plaintiff is induced by fraud to enter into a contract.²⁵⁴

The court reaffirmed the *Testerman-Wedeman* distinction between torts "arising out of contract" and torts simply in *Schaefer v. Miller*.²⁵⁵ In a concurring opinion, however, Judge Eldridge argued that the *Testerman-Wedeman* standard should be overruled.²⁵⁶ Judge Eldridge argued that it is irrational to have the requisite malice depend on the timing of the tortious act, i.e., whether it occurred before or after the contract with which it was associated, as opposed to the conduct of the defendant.²⁵⁷ Because the purpose of punitive damages is to punish and deter outrageous conduct, the standard for awarding such damages should depend on the nature of the conduct rather than its timing.²⁵⁸ Judge Eldridge also pointed out that the *Testerman-Wedeman* rule had been "arbitrarily and inconsistently applied."²⁵⁹

The *Testerman-Wedeman* "arising out of contract" distinction for punitive damages was finally overruled in *Owens-Illinois, Inc. v. Zenobia*.²⁶⁰ The *Zenobia* court specifically noted the fact that "in recent years there ha[d] been a proliferation of claims for punitive damages in tort cases, and awards of punitive damages have often been extremely high."²⁶¹ The court was also influenced by the "renewed criticism of the concept of punitive damages in a tort system designed primarily to compensate injured parties for harm."²⁶² Accordingly, the *Zenobia* court found it necessary to "more precisely define the nature of conduct potentially subject to a punitive damages award in

253. See *id.* at 528-30, 366 A.2d at 10-11. The court defined implied malice as "conduct of an extraordinary nature characterized by a wanton or reckless disregard for the rights of others." *Id.* at 532, 366 A.2d at 13 (citing *St. Paul at Chase v. Manufacturers Life Ins.*, 262 Md. 192, 238-39, 278 A.2d 12, 34-35 (1971)).

254. *Id.* at 529-30, 366 A.2d at 11.

255. 322 Md. 297, 587 A.2d 491 (1991) (plurality opinion).

256. *Id.* at 312, 587 A.2d at 499 (Eldridge, J., concurring).

257. *Id.* at 320-22, 587 A.2d at 502-04.

258. See *id.* at 321-22, 587 A.2d at 503-04; *infra* notes 329-334 and accompanying text (discussing the purposes of punitive damages).

259. *Schaefer*, 322 Md. at 312, 587 A.2d at 499 (Eldridge, J., concurring).

260. 325 Md. 420, 601 A.2d 633 (1992).

261. *Id.* at 450-51, 601 A.2d at 648 (citing 2 J. GHIARDI & J. KIRCHER, PUNITIVE DAMAGES LAW AND PRACTICE § 21.01, at 2 (1985); M. PETERSON ET AL., PUNITIVE DAMAGES (Rand, The Institute for Civil Justice, 1987); D. Owen, *Problems in Assessing Punitive Damages Against Manufacturers of Defective Products*, 49 U. CHI. L. REV. 1, 6 (1982); J. Sales & K. Cole, *Punitive Damages: A Relic that Has Outlived Its Origins*, 37 VAND. L. REV. 1117, 1154 (1984)).

262. *Id.* at 451, 601 A.2d at 648. The *Zenobia* court found the criticism in Maryland to be "partly fueled and justified because juries are provided with imprecise and uncertain characterizations of the type of conduct which will expose a defendant to a potential award of punitive damages." *Id.*

non-intentional tort cases.”²⁶³ Relying heavily on Judge Eldridge’s concurring opinion in *Schaefer*, the *Zenobia* court decided that the timing of a tort in relation to the “formation of a contractual relationship should not determine whether actual or implied malice is required for allowing an award of punitive damages.”²⁶⁴ Instead, the court held that the availability of punitive damages should “depend upon the heinous nature of the defendant’s tortious conduct.”²⁶⁵ The court reasoned that this standard would further the purposes of punitive damages—punishment and deterrence—by applying to all defendants whose conduct is “characterized by evil motive, intent to injure, or fraud.”²⁶⁶ The *Zenobia* court noted that, absent a uniform standard for punitive damages, “[t]he irrational and inconsistent application of a punitive damages standard undermines the objective of deterrence because persons cannot predict, and thus choose to abstain from, the type of behavior that is sanctioned by a punitive damages award.”²⁶⁷

The court also held that “implied malice” was no longer an appropriate basis for allowing punitive damages under Maryland common law.²⁶⁸ The court found that the implied malice test articulated in *Smith* “resulted in inconsistent jury verdicts involving similar facts.”²⁶⁹ Furthermore, the *Smith* standard provided “little guidance for individuals and companies to enable them to predict behavior that [would] either trigger or avoid punitive damages liability, and it undermine[d] the deterrent effect of [punitive damage] awards.”²⁷⁰ Accordingly, the *Zenobia* court found that to recover punitive damages in non-intentional tort actions, the defendant’s conduct must evidence “actual malice,” defined as “evil motive, intent to injure, ill will or fraud.”²⁷¹

In addition to making it more difficult to obtain punitive damages by requiring the plaintiff to show that the defendant acted with actual (and not merely implied) malice, *Zenobia* raised the bar with respect to the plaintiff’s standard of proof.²⁷² The court held that in “any tort case a plaintiff must establish by clear and convincing evi-

263. *Id.*

264. *Id.* at 454, 601 A.2d at 649.

265. *Id.*

266. *Id.*, 601 A.2d at 650.

267. *Id.* at 455, 601 A.2d at 650.

268. *Id.* at 459-60, 601 A.2d at 652. In so ruling, the *Zenobia* decision explicitly overruled *Smith v. Gray Concrete Pipe Co.*, 267 Md. 149, 297 A.2d 721 (1972). *Zenobia*, 325 Md. at 460, 601 A.2d at 652.

269. *Zenobia*, 325 Md. at 459, 601 A.2d at 652.

270. *Id.*

271. *Id.* at 460, 601 A.2d at 652.

272. *Id.* at 469, 601 A.2d at 657.

dence the basis for an award of punitive damages."²⁷³ The court reasoned that this heightened standard of proof was appropriate in light of the "penal nature" of punitive damages, and their "potential for debilitating harm."²⁷⁴ Finally, although the court held that the heightened standard of "clear and convincing evidence" applies to "all tort actions," it suggested that the requirement of showing "actual malice" might be limited to non-intentional tort actions.²⁷⁵

Three years after *Zenobia*, however, the court extended its requirement of showing "actual malice" to intentional torts in *Ellerin v. Fairfax Savings, F.S.B.*²⁷⁶ The *Ellerin* court considered the appropriate standard for allowing punitive damages in a fraud action.²⁷⁷ The court noted that, in most cases, punitive damages are allowed in actions where the defendant's tortious conduct "is characterized by knowing and deliberate wrongdoing."²⁷⁸ Thus, the court first considered whether fraud inherently involves the state of mind contemplated by the actual malice standard.²⁷⁹ The court focused its attention on the element of knowledge required by fraud, i.e., "that [the] falsity [of the defendant's representation] was either known to the defendant or that the representation was made with reckless indifference as to its truth."²⁸⁰ The court characterized "reckless indifference" as "the defendant's awareness that he does not know whether the representation is true or false."²⁸¹ The court found that, although such reckless indifference does encompass a level of knowledge, albeit knowledge that one does not know the truth or falsity of one's representation, actual knowledge of the falsity is necessary to support an award of punitive damages for fraud.²⁸² The court reasoned that, although reckless indifference to the truth represented a higher degree of knowledge than negligence or gross negligence, it did not rise

273. *Id.*

274. *Id.*

275. *See id.* at 460 n.21, 601 A.2d at 653 n.21 (asserting that *Zenobia* does not "modify the legal principles concerning the type of conduct which will support an award of punitive damages in so-called intentional tort actions").

276. 337 Md. 216, 652 A.2d 1117 (1995).

277. *Id.* at 219, 652 A.2d at 1118.

278. *Id.* at 228, 652 A.2d at 1123.

279. *See generally id.* at 229-31, 652 A.2d at 1123-24 (comparing the elements of fraud to the actual malice standard).

280. *Id.* at 229, 652 A.2d at 1123 (quoting *Nails v. S & R*, 334 Md. 398, 415-16, 639 A.2d 660, 668-69 (1994)).

281. *Id.* at 231, 652 A.2d at 1124.

282. *Id.* at 234-35, 652 A.2d at 1126.

to the level of the "actual malice" required for an award of punitive damages.²⁸³

In *Montgomery Ward v. Wilson*,²⁸⁴ the Court of Appeals clarified the holdings of *Zenobia* and *Ellerin*. The *Wilson* Court pointed out that, although these prior decisions modified the standards for allowing punitive damages, they were guided by the "traditional policy and purpose of punitive damages in Maryland, which have been 'articulated in our cases for over a century.'"²⁸⁵ This purpose is "to punish a defendant whose conduct is characterized by evil motive, intent to injure, or fraud, and to warn others contemplating similar conduct of the serious risk of monetary liability."²⁸⁶ In view of this purpose, the *Wilson* court clarified that, under *Zenobia* and *Ellerin*, "actual malice" in the sense of "conscious and deliberate wrongdoing" must be the basis for an award of punitive damages, and that this standard applies to both intentional and non-intentional torts.²⁸⁷ Finally, with respect to both intentional and non-intentional torts, the *Wilson* Court reaffirmed the *Zenobia* requirement that a plaintiff meet the "clear and convincing evidence" standard of proof for an award of punitive damages.²⁸⁸

In *Scott v. Jenkins*,²⁸⁹ an intentional tort case, the court once again summarized and clarified its stance on allowing punitive damages in both intentional and non-intentional tort actions. The *Scott* court stated:

Since *Zenobia*, we have made it abundantly clear that "with respect to both intentional and non-intentional torts, . . . an award of punitive damages must be based upon actual malice, in the sense of conscious and deliberate wrongdoing, evil or wrongful motive, intent to injure, ill will, or fraud."²⁹⁰

The *Scott* court also reaffirmed that actual malice must be shown by "clear and convincing evidence" to recover punitive damages.²⁹¹

283. *Id.* At the same time, however, the court noted that most fraud involves "the form of the tort which is characterized by the defendant's deliberate deception of the plaintiff by means of a representation which he knows to be false," so that most fraud would involve the actual malice required for an award of punitive damages. *Id.* at 234, 652 A.2d at 1126.

284. 339 Md. 701, 664 A.2d 916 (1995).

285. *Id.* at 734, 664 A.2d at 932 (quoting *Ellerin*, 337 Md. at 227, 652 A.2d at 1122).

286. *Id.* (quoting *Owens-Illinois, Inc. v. Zenobia*, 325 Md. 420, 454, 601 A.2d 633, 650 (1992)).

287. *Id.* at 733, 664 A.2d at 932.

288. *Id.* at 734, 664 A.2d at 932.

289. 345 Md. 21, 690 A.2d 1000 (1997).

290. *Id.* at 33-34, 690 A.2d at 1006 (quoting *Wilson*, 339 Md. at 733, 664 A.2d at 932).

291. *Id.* at 29, 690 A.2d at 1003-04.

3. *The Court's Reasoning.*—In *Le Marc's Management Corp. v. Valentin*, the Court of Appeals held that an award of punitive damages is permitted in a defamation action only if the plaintiff proves, by clear and convincing evidence, that the defendant had actual knowledge that the defamatory statement was false.²⁹² Writing for the majority, Judge Eldridge began his analysis by summarizing the state of Maryland common law with regard to defamation and punitive damages.²⁹³ In Maryland, a plaintiff seeking punitive damages “in any defamation action” carries the burden of proving, by clear and convincing evidence, that the defendant acted with “knowledge of . . . falsity or with reckless disregard for the truth.”²⁹⁴ Thus, the “actual malice” necessary to recover punitive damages in the context of defamation does not mean “ill will, spite, hatred, or intent to injure.”²⁹⁵

Dealing generally with an award of punitive damages, the *Le Marc's* court found that in any tort action, such an award must be based on the defendant's “conscious wrongdoing.”²⁹⁶ Applying this requirement of conscious wrongdoing to defamation actions, the *Le Marc's* court reasoned that proof of the defendant's actual knowledge that the defamatory statement was false is a prerequisite to recovering punitive damages in defamation actions.²⁹⁷

Turning to the specific question of the appropriateness of using “reckless disregard” as a standard for an award of punitive damages in defamation actions, the *Le Marc's* court focused on its previous decision in *Ellerin v. Fairfax Savings, F.S.B.*²⁹⁸ *Ellerin* specifically held that, in the context of fraud, “reckless indifference” as to the truth, i.e., not knowing whether a misrepresentation is true or false, does not suffice to support an award of punitive damages because this state of mind falls short of the conscious wrongdoing or “actual malice” required by

292. *Le Marc's*, 349 Md. at 653, 709 A.2d at 1226.

293. *Id.* at 651, 709 A.2d at 1225.

294. *Id.* In Maryland, this burden applies to any plaintiff, regardless of a party's status as a public official, public figure, or private individual, and regardless of the subject matter. This blanket requirement differs from the Supreme Court's distinctions in defamation cases. See *id.* at 650-51, 709 A.2d at 1225; *supra* notes 194-212 (discussing the Supreme Court's defamation jurisprudence).

295. *Le Marc's*, 349 Md. at 651, 709 A.2d at 1225.

296. *Id.* at 652, 709 A.2d at 1226.

297. *Id.* at 652-53, 709 A.2d at 1226. The court did note, however, that “actual knowledge . . . does include the wilful refusal to know.” *Id.* at 652 n.4, 709 A.2d at 1226 n.4 (internal quotation marks omitted) (quoting *Owens-Illinois, Inc. v. Zenobia*, 325 Md. 420, 462 n.23, 601 A.2d 633, 654 n.23 (1992)).

298. See *id.* at 653, 709 A.2d at 1226 (noting that the “recent opinion which is most pertinent to the present case is *Ellerin*”).

such an award.²⁹⁹ Applying *Ellerin* to the case at hand, the *Le Marc*'s court found that "*Ellerin* supports actual knowledge of the falsity [of a defamatory statement] as the sole standard for the award of punitive damages in defamation cases."³⁰⁰ The court reasoned that, just as "reckless indifference" in the context of fraud would not support an award of punitive damages because it does not involve the conscious wrongdoing contemplated by such an award, "reckless disregard" in the context of defamation would not support an award of punitive damages for the same reason. Therefore, while a plaintiff may recover compensatory damages by showing the defendant's reckless disregard for the falsity of a defamatory statement, the plaintiff must show something more—actual malice, i.e., actual knowledge of the falsity of the defamatory statement—in order to recover punitive damages in a defamation action.³⁰¹

In a dissenting opinion, Chief Judge Bell described the majority's decision as a continuation of an "inexorable campaign . . . to eliminate punitive damages and thereby insulate certain reprehensible conduct from proper punishment."³⁰² Chief Judge Bell first noted that, although the majority may not have intended to eliminate punitive damage awards from Maryland law, this was the practical effect of establishing a standard "virtually impossible to meet."³⁰³

Chief Judge Bell also disagreed with the majority's "actual knowledge" standard.³⁰⁴ Chief Judge Bell pointed out that, while the majority acknowledged that "acting with 'reckless indifference' indicates that the defendant has 'actual knowledge' of his or her lack of knowledge as to the veracity or falsity of the statement," what must be established under *Le Marc*'s "is that the defendant knew, in fact, that the statement was false."³⁰⁵ Chief Judge Bell argued that such reasoning ignores the fact that conduct characterized as "reckless indifference" is "no less reprehensible than the conduct engaged in with actual knowledge."³⁰⁶

Pointing out that "[t]he damage to the defamed person is the same whether the defamer actually knows that what he or she is saying

299. *Ellerin v. Fairfax Savings, F.S.B.*, 337 Md. 216, 235-37, 652 A.2d 1117, 1126-27 (1995); see also *supra* notes 276-283 and accompanying text (discussing this case).

300. *Le Marc*'s, 349 Md. at 654, 709 A.2d at 1227.

301. See *id.* at 655, 709 A.2d at 1227 (concluding that "'reckless disregard' must be rejected as a standard for the award of punitive damages in defamation cases").

302. *Id.* at 656, 709 A.2d at 1228 (Bell, C.J., dissenting).

303. *Id.*

304. *Id.* at 658, 709 A.2d at 1229.

305. *Id.*

306. *Id.* at 658-59, 709 A.2d at 1229.

is false or simply knows that he or she does not know if the statement is true or false," Chief Judge Bell also argued that the majority's decision allows a defamer to "publish a false statement about the plaintiff with impunity, without any investigation beyond his or her own records, and, yet, remain insulated from the risk of punitive damages."³⁰⁷

4. *Analysis.*—

a. *Logical Extension of Prior Case Law.*—In *Le Marc's Management Corp.*, the Court of Appeals reaffirmed that an award of punitive damages must be based on the defendant's "'conscious and deliberate wrongdoing.'"³⁰⁸ The court found that, in the context of defamation, this requirement entails that the defendant possess actual knowledge that the defamatory statement was false.³⁰⁹ One interpretation of this decision is that it is simply a logical extension of the court's previous holding in *Ellerin v. Fairfax Savings, F.S.B.*³¹⁰ As already noted, the *Le Marc's* court found that because *Ellerin* rejected "reckless indifference" as an appropriate basis for a punitive damage award in the context of fraud, the logical extension is to reject "reckless disregard" as the basis for such an award in the context of defamation.³¹¹ Therefore the strengths and flaws of *Le Marc's* stem from the court's previous holding in *Ellerin*. The reasoning of *Ellerin*, however, did not adequately address the justifications for the court's "actual knowledge" requirement in fraud cases, and should not have been extended to *Le Marc's*. As Chief Judge Bell noted in his *Ellerin* dissent, "making a representation of a fact, with intent to deceive and actual knowledge that the speaker does not know whether it is fact or not, is as much a misrepresentation as one made with actual knowledge of falsity and that actual knowledge of the former is as reprehensible as actual knowledge of the latter."³¹² Furthermore, prior to *Ellerin*, it was "well settled, that a defendant, intending to mislead the plaintiff and fully aware that he or she does not know whether the representation he or she makes is true or false, commits the tort of fraud or deceit."³¹³ The *Le Marc's*

307. *Id.* at 659-60, 709 A.2d at 1129-30.

308. *Le Marc's*, 349 Md. at 652, 709 A.2d at 1226 (quoting *Montgomery Ward v. Wilson*, 339 Md. 701, 733, 664 A.2d 916, 932 (1995)).

309. *Id.* at 654, 709 A.2d at 1227.

310. 337 Md. 216, 652 A.2d 1117 (1995). See *supra* notes 276-283.

311. See *Le Marc's*, 349 Md. at 654, 709 A.2d at 1227 ("It is clear that the holding in *Ellerin* supports actual knowledge of the falsity as the sole standard for the award of punitive damages in defamation cases as well.").

312. *Ellerin*, 377 Md. at 244, 652 A.2d at 1131 (Bell, C.J., concurring and dissenting).

313. *Id.*

court therefore should not have based its reasoning on its previous holding in *Ellerin*, because, now, the law of punitive damages with respect to defamation carries the same flaw as that law with respect to fraud, namely, an inapplicability to genuinely reprehensible conduct.

Le Marc's found that actual malice requires a showing that the defendant had actual knowledge of the falsity of the statement.³¹⁴ The court reached this holding even though it conceded that both "reckless disregard" and "reckless indifference" encompass a level of actual knowledge, albeit one that "is not a level sufficient to satisfy the actual knowledge of falsity required for punitive damages."³¹⁵

By requiring a level of actual knowledge higher than knowing that one does not know the truth or falsity of a defamatory statement, the Maryland Court of Appeals practically eliminates punitive damage awards for defamation cases in Maryland.³¹⁶ To establish what a defendant consciously knew, a plaintiff will likely need nothing short of a "smoking-gun" type of admission. The result is a standard that diserves the traditional purposes of punitive damages by insulating reprehensible conduct.

b. *The New Standard.*—The first and most obvious consequence of the *Le Marc's* decision is that Maryland courts now require a higher standard of proof for plaintiffs seeking punitive damage awards in defamation cases.³¹⁷ Prior to *Le Marc's*, a plaintiff seeking punitive damages could succeed upon showing that the defendant had acted "with reckless disregard for the truth."³¹⁸ *Le Marc's* develops a more stringent standard, specifically rejecting reckless disregard for the truth as an appropriate basis for punitive damages, and holding that such an award requires a showing of actual malice in the limited sense of the defendant's knowledge of the falsity of the defamatory state-

314. *Le Marc's*, 349 Md. at 653, 709 A.2d at 1226.

315. *Id.* at 654, 709 A.2d at 1227.

316. *See id.* at 656, 709 A.2d at 1228 (Bell, C.J., dissenting) (finding that the majority's decision raises "the standard for the allowance of punitive damages . . . to a level that is virtually impossible to meet").

317. *See id.* at 658, 709 A.2d at 1229 ("In this case, the majority has changed the standard for award of punitive damages in defamation cases.").

318. *See Marchesi v. Franchino*, 283 Md. 131, 139, 387 A.2d 1129, 1133 (1978) (holding that a showing of the defendant's "knowledge of falsity or reckless disregard for truth" is sufficient to overcome a conditional privilege defense, and adopting this standard for punitive damages). With respect to the degree of proof required, the *Le Marc's* court reaffirmed its previous holding in *Zenobia* that clear and convincing evidence of the basis for an award of punitive damages is required for such an award in "any tort." *Compare Le Marc's*, 349 Md. at 656, 709 A.2d at 1228 (requiring clear and convincing proof of actual knowledge) with *Owens-Illinois, Inc. v. Zenobia*, 325 Md. 420, 469, 601 A.2d 633, 657 (1992) (requiring this type of evidence to get punitive damages in any tort).

ment.³¹⁹ Because the court bases its decision on *Zenobia* and its progeny, the majority overrules *Marchesi*, *Piskor*, and *Jacron Sales*, "and replaces the standard they announced with one requiring that the plaintiff establish the defendant's actual knowledge of the falsity of the defamatory statement."³²⁰

Le Marc's can be seen as the culmination of a series of cases in which the Maryland Court of Appeals has consistently raised the bar with respect to a plaintiff's burden for obtaining an award of punitive damages.³²¹ These cases have changed the requirements for punitive damage awards in a number of torts, including products liability,³²² fraud and deceit,³²³ and now defamation.³²⁴ The result of these decisions, and *Le Marc's* in particular, is the creation of a standard that all but eliminates punitive damage awards in Maryland.³²⁵ This consequence is evident from the fact that, since the 1992 *Zenobia* decision, the Court of Appeals has overruled an award of punitive damages, or affirmed a reversal of such an award by an appellate court, in fourteen of fifteen cases.³²⁶ The only case to come before the court during this period in which it affirmed an award of punitive damages was one in which the defendant failed to preserve the issue for appellate review.³²⁷

With respect to defamation in particular, the *Le Marc's* decision renders punitive damages virtually impossible to achieve. To require a plaintiff to prove that a defendant acted with malice is a difficult standard by itself. Requiring a plaintiff to prove the defendant had actual knowledge of something as specific as the falsehood of his or her statement is an even higher bar. In creating such a high standard, the Court of Appeals has significantly undercut the traditional purposes of punitive damages.³²⁸ In doing so, the Court has pushed

319. See generally *Le Marc's*, 349 Md. at 651-53, 709 A.2d at 1225-26 (comparing prior case law concerning standards for punitive damages in other torts with the appropriateness of punitive damages in a defamation case).

320. *Id.* at 658, 709 A.2d at 1229 (Bell, C.J., dissenting).

321. See *supra* notes 260-291 and accompanying text (discussing the series of punitive damage decisions from *Zenobia* to *Scott* in which the plaintiff's burden for proving punitive damages was increased).

322. See *Zenobia*, 325 Md. at 460-62, 601 A.2d at 652-53.

323. See *Ellerin v. Fairfax Sav., F.S.B.*, 337 Md. 216, 235-36, 652 A.2d 1117, 1126-27 (1995).

324. *Le Marc's*, 349 Md. at 653, 709 A.2d at 1226.

325. See *id.* at 656, 709 A.2d at 1228 (Bell, C.J., dissenting).

326. See *id.* at 657, 709 A.2d at 1228 (citing cases).

327. See *id.* (referring to *Macklin v. Robert Logan Assocs.*, 334 Md. 287, 312, 639 A.2d 112, 124 (1994)).

328. See *id.* at 657-58, 709 A.2d at 1228-29 (objecting to the "allowance of reprehensible conduct being insulated from punishment by way of punitive damages").

Maryland into a small group of jurisdictions that either have done away with punitive damage awards, or like Maryland, have rendered them practically extinct.

c. Traditional Purposes of Punitive Damages in the United States and Maryland.—In significantly raising the bar with respect to punitive damages, the court's decision in *Le Marc*'s ignores the traditional purposes of punitive damages. As far back as 1791 in American common law, punitive damages have been used to serve a number of purposes.³²⁹ Development of punitive damages in the twentieth century has led to two widely accepted purposes: punishment and deterrence.³³⁰ Although some jurisdictions have rejected punitive damages altogether,³³¹ in almost all states, punitive damages are well established as a means of punishing wrongdoers and deterring reprehensible behavior.³³² This widely accepted purpose is also embraced by the *Restatement (Second) of Torts*, which states:

329. See 1 LINDA L. SCHLUETER & KENNETH R. REDDEN, PUNITIVE DAMAGES § 1.4, at 15 (3d ed. 1995) (discussing the "arrival" in America of punitive damages from English common law, and citing American cases as early as 1791). On this account, punitive damages have been used to "justify verdicts that were excessive in relation to the actual damages awarded," compensate for mental anguish, compensate for other intangible harms, deter the wrongdoer, redress unequal punishment at criminal law, and prevent revenge. *Id.* § 1.3(B-G), at 7-11.

330. *Id.* § 1.4(B), at 17.

331. Five jurisdictions in the U.S. have totally prohibited punitive damages: Louisiana, Massachusetts, Nebraska, New York, and Washington. See 1 GHIARDI & KIRCHER, *supra* note 193, §§ 4.06 to -12; see also N.H. REV. STAT. ANN. § 507:16 (1997) (prohibiting an award of punitive damages in all actions, unless specifically authorized by statute); *McCoy v. Arkansas Natural Gas Co.*, 143 So. 383, 385-86 (La. 1932) ("There is no authority in the law of Louisiana for allowing punitive damages in any case, unless it be for some particular wrong for which a statute expressly authorizes the imposition of some such penalty."); *City of Lowell v. Massachusetts Bonding & Ins. Co.*, 47 N.E.2d 265, 272 (Mass. 1943) (finding that punitive damages are not allowed unless expressly authorized by statute); *Abel v. Conover*, 104 N.W.2d 684, 688 (Neb. 1960) (noting that "a fundamental rule of law in this state [is] that punitive, vindictive, or exemplary damages will not be allowed"); *Spokane Truck and Dray Co. v. Hoefer*, 25 P. 1072, 1073-74 (Wash. 1891) (finding that because it is unjust to interject the penal element of a criminal trial into a civil proceeding, plaintiffs are not allowed to recover punitive damages in addition to compensatory damages).

In addition, three jurisdictions in the United States, Connecticut, Michigan, and Texas, treat punitive damages as compensatory. See 1 GHIARDI & KIRCHER, *supra* note 193, §§ 4.02 to -.05 (finding that in Connecticut, Michigan, and Texas, "although the terms 'punitive damages' or 'exemplary damages' are generally used, the application of the law relating to those damages is such that they are, at least in part, truly compensatory in nature").

332. 1 SCHLUETER & REDDEN, *supra* note 329, § 2.2 (finding that in those jurisdictions which allow punitive damages, "punitive damages [are] too popular and well established to be discarded"); see also *id.* § 2.2 (A)(1) (finding that "[t]he most frequently stated purpose of punitive damages is to punish the defendant for his wrongdoing and to deter him and others from similar misconduct").

Punitive damages are damages, other than compensatory or nominal damages, awarded against a person to punish him for his outrageous conduct and to deter him and others like him from similar conduct in the future.³³³

In Maryland, punitive damages have been awarded for the same reasons, namely "to punish the defendant for egregiously bad conduct toward the plaintiff, [and] also to deter the defendant and others contemplating similar behavior."³³⁴

The Court's decision in *Le Marc's* does not specifically discuss the purposes of punitive damages in defamation, or in any other tort. The decision does, however, reiterate that punitive damage awards in tort cases must be based on the defendant's "conscious and deliberate wrongdoing, evil or wrongful motive, intent to injure, ill will, or fraud."³³⁵ This basis makes sense because only conduct of this nature can be rightfully punished and effectively deterred. Where the *Le Marc's* decision falls short, however, is not in failing to recognize the purposes of punitive damages, but in eliminating punitive damages with respect to conduct of the sort to which these damages, and the purposes behind them, are traditionally applicable. By shielding defendants who make statements with an intent to defame and actual knowledge that they do not know whether their statement is true or false, the *Le Marc's* decision prohibits the application of a long recognized penalty to clearly reprehensible conduct.

d. Maryland's Standard Compared to Other Jurisdictions.—In affirming its "recent decisions"³³⁶ requiring the basis for punitive damages to be proved by clear and convincing evidence, the Court of Appeals has chosen to become part of a slight majority of jurisdictions that demand such a level of proof to establish a punitive damage award. In the United States, twenty-eight jurisdictions require that a punitive damage award be based on clear and convincing evidence.³³⁷ Only one state, Colorado, requires proof beyond a reasonable doubt,

333. RESTATEMENT (SECOND) OF TORTS § 908(1) (1979).

334. *Bowden v. Caldor, Inc.*, 350 Md. 4, 22, 710 A.2d 267, 276 (1998) (internal quotation marks omitted) (alteration in original) (quoting *Owens-Corning v. Garrett*, 343 Md. 500, 537-38, 682 A.2d 1143, 1161 (1996)).

335. *Le Marc's*, 349 Md. at 652, 709 A.2d at 1226 (internal quotation marks omitted) (quoting *Montgomery Ward v. Wilson*, 339 Md. 701, 733, 664 A.2d 916, 932 (1995)).

336. *Id.* at 653, 709 A.2d at 1226.

337. RICHARD L. BLATT ET AL., PUNITIVE DAMAGES: A STATE BY STATE GUIDE TO LAW AND PRACTICE § 8.2, table 8-1 (1991 & Supp. 1996).

and the balance of the jurisdictions require proof of the basis for punitive damage awards by a preponderance of the evidence.³³⁸

Requiring proof that the defendant acted with malice is a standard followed by fifteen jurisdictions.³³⁹ Because twenty-five jurisdictions require only a showing that the defendant's conduct was more egregious than gross negligence, thus falling short of requiring proof of malice, Maryland law falls into the minority of jurisdictions requiring actual malice.³⁴⁰

It is important to note, however, that the application of these standards varies significantly. For example, some "malice" jurisdictions allow an award of punitive damages based on a showing of implied malice,³⁴¹ an idea explicitly rejected in Maryland law.³⁴² The *Le Marc's* decision has pushed Maryland further down the path towards abolishing the principle of punitive damage awards.³⁴³ Maryland is now one of the most difficult jurisdictions in the United States for a plaintiff to recover punitive damages and the result is a standard that shields reprehensible conduct.

e. Shielding Reprehensible Conduct.—In holding that punitive damage awards in a defamation case must be based on actual knowledge that the defamatory statement was false, the *Le Marc's* court shields reprehensible conduct and thus undermines the traditional purposes of punitive damages. As the majority in *Le Marc's* concedes, the "reckless indifference" towards the truth or falsity of a defamatory statement that is insufficient to support an award of punitive damages does in fact encompass "a level of actual knowledge," namely, "actual knowledge that he or she did not know whether the statement was true or false."³⁴⁴ Following *Le Marc's*, a defendant who acts with this admitted level of actual knowledge will not be subject to punitive damages. The important result of *Le Marc's* is that these reckless actors will no longer be subject to punitive damages, even though their level of actual knowledge will produce the same damage to the plaintiff as the

338. *Id.*

339. *Id.* § 3.2.

340. *Id.*

341. Arizona, Maine, and Ohio allow an award of punitive damages based on a showing of implied malice. *Id.*

342. See *Owens-Illinois, Inc. v. Zenobia*, 325 Md. 420, 459, 601 A.2d 633, 652 (1992) (rejecting the implied malice standard); *supra* notes 268-271 and accompanying text (discussing *Zenobia's* treatment of this issue).

343. See *supra* notes 316, 328, 340 and accompanying text (noting that the practical effect of *Le Marc's* is to eliminate punitive damages in defamation, and comparing Maryland to other jurisdictions).

344. *Le Marc's*, 349 Md. at 654, 709 A.2d at 1227.

higher level of actual malice.³⁴⁵ Further, the fact that actual malice includes "the wilful refusal to know" offers little relief.³⁴⁶ Willful refusal to know is a form of knowledge that "exists where a person believes that it is probable that something is a fact, but deliberately shuts his or her eyes or avoids making a reasonable inquiry with a conscious purpose to avoid learning the truth."³⁴⁷ The fact that actual malice includes this state of mind does not, however, address the situation in which a defendant should have made further inquiries, but for any reason besides a conscious purpose to avoid learning the truth, did not do so. Furthermore, proving that a defendant deliberately shut his or her eyes is just as difficult as proving he or she acted with actual knowledge because in both cases proof of the actor's mental state at the time is necessarily required.

The conduct of acting with reckless disregard concerning the truth should be deterred as forcefully as the conduct of acting with actual knowledge of the falsity. Punitive damages *can* deter both types of conduct, because acting with reckless disregard and acting with actual knowledge of the falsity of a statement both encompass a level of actual knowledge, and because both involve "conscious and deliberate wrongdoing."³⁴⁸ For this reason, punitive damages are necessary to deter both types of conduct.

Rendering punitive damages inapplicable to conduct involving reckless disregard illustrates both their necessity and the inconsistency of applying them only to conduct involving actual knowledge. First, punitive damages are necessary in this context. Traditionally, defamation has been used to recover "damages suffered to one's reputation by a wrongful communication."³⁴⁹ A wrongful communication made with actual knowledge of falsity or a wrongful communication made with the actual knowledge that one does not know the truth or falsity

345. See *id.* at 658, 709 A.2d at 1229 (Bell, C.J., dissenting) ("The damage to the defamed person is the same whether the defamer actually knows that what he or she is saying is false or simply knows that he or she does not know if the statement is true or false.").

346. See *Le Marc's*, 349 Md. at 653 n.4, 709 A.2d at 1226 n.4 (recognizing that "actual knowledge . . . does include the wilful refusal to know" (quoting *Owens-Illinois, Inc. v. Zenobia*, 325 Md. 420, 462 n.23, 601 A.2d 633, 654 n.23 (1992))).

347. *State v. McCallum*, 321 Md. 451, 458, 583 A.2d 250, 253 (1991) (Chasanow, J., concurring).

348. See *Le Marc's*, 349 Md. at 652, 709 A.2d at 1226 (finding conscious and deliberate wrongdoing to be the appropriate basis for a punitive damage award) (internal quotation marks omitted) (quoting *Montgomery Ward v. Wilson*, 339 Md. 701, 733, 664 A.2d 916, 932 (1995)).

349. 1 SCHLUETER & REDDEN, *supra* note 329, § 9.6(a), at 543.

still results in damage to the plaintiff's reputation.³⁵⁰ The tort of defamation allows for compensation for the plaintiff in either situation. Without punitive damages, however, an actor's egregious conduct, despite knowledge that such conduct could damage the plaintiff's reputation, is not punished or deterred.

A second result of the higher standard is that it no longer matters if the defendant's actions are negligent or grossly negligent. Any action falling short of actual malice, defined as actual knowledge, will result in liability for compensatory damages only. The result is that punitive damages do not punish or even have a deterrent effect towards grossly negligent conduct. As then Judge Bell noted in *Zenobia*, "from the standpoint of a defendant's pocketbook, [because] it makes no difference in the award of damages, whether he or she is negligent or grossly negligent, . . . requiring that [the] defendant . . . pay compensatory damages for the victims's injuries is not likely to have a deterrent effect."³⁵¹

Applying this reasoning to defamation highlights the potential problem. Not only does *Le Marc's* fail to deter potential defendants who act with reckless disregard, it encourages potential defamers to decide that the less they know about a subject, the better, because an uninformed defendant, even when "a brief investigation would have made clear the falsity of the statement," will not be subject to punitive damages.³⁵²

5. *Conclusion.*—With *Le Marc's Management Corp. v. Valentin*, the Court of Appeals has yet again raised the standard for an award of punitive damages in defamation cases. The former standard of reckless disregard allowed for punitive damages to deter and punish wrongdoers. The Court of Appeals's current standard leaves the potential for punitive damage awards only in specific and rare cases in which actual knowledge is demonstrated by clear and convincing evidence, a virtually insurmountable requirement.

With regard to defamation, this situation is particularly troublesome. As Chief Judge Bell notes in his *Le Marc's* dissent, the result is

350. See *Le Marc's*, 349 Md. at 659, 709 A.2d at 1229 (Bell, C.J., dissenting) (finding that in either situation the "damage to the defamed person is the same").

351. *Owens-Illinois, Inc. v. Zenobia*, 325 Md. 420, 484-85, 601 A.2d 633, 665 (1992) (Bell, J., concurring and dissenting).

352. See *Le Marc's*, 349 Md. at 659-60, 709 A.2d at 1229-30 (Bell, C.J., dissenting) (interpreting the majority as saying that "as long as there is no evidence that the defamer actually knew the information was false and, I suppose, did not shut his or her eyes to what must have been obvious, it does not matter that a brief investigation would have made clear the falsity of the statement").

that "the defamer may publish a false statement about the plaintiff with impunity, without any investigation beyond his or her own records, and, yet, remain insulated from the risk of punitive damages."³⁵³ More importantly, Chief Judge Bell points out that after the *Le Marc's* decision, this "is precisely what will happen with more and more frequency,"³⁵⁴ so that the decision will undercut not only the purposes of punitive damages, but the foundation of the tort of defamation itself.

IAN C. TAYLOR

353. *Id.* at 660, 709 A.2d at 1230.

354. *Id.*

XIII. TORTS

A. *Parent-Child Immunity: The Time for a Change is Overdue*

In *Eagan v. Calhoun*,¹ the Court of Appeals held that when a minor child brings a wrongful death action against a surviving parent for the murder or voluntary manslaughter of the other parent, the exception to the doctrine of parent-child immunity established in *Mahnke v. Moore*² applies as a matter of law.³ In so holding, the court presented a modest rule that reaffirmed the court's commitment to the doctrine of parent-child immunity. However, the court evaded the larger issue concerning the continuing viability of this doctrine, which is founded upon social policy justifications formulated in earlier decades.⁴ An evaluation of these policy arguments reveals that they no longer justify application of the immunity rule. Therefore, the court should completely or partially abrogate the doctrine. Unfortunately, the court missed its opportunity to do so and refused to create a general exception to parent-child immunity for claimants in wrongful death actions.⁵

1. *The Case*.—On May 13, 1992, John Calhoun angrily kicked the ladder on which his wife, Gladys Calhoun, stood,⁶ causing her to fall to her death.⁷ After her fall, John Calhoun failed to assist his wife by either administering CPR⁸ or calling for assistance, and left his wife

1. 347 Md. 72, 698 A.2d 1097 (1997).

2. 197 Md. 61, 77 A.2d 923 (1951); see *infra* text accompanying notes 73-74 (stating the exception established by *Mahnke*).

3. *Eagan*, 347 Md. at 83-84, 698 A.2d at 1103.

4. See Gail D. Hollister, *Parent-Child Immunity: A Doctrine in Search of Justification*, 50 FORDHAM L. REV. 489, 508 (1982) ("In the ninety years since the initial adoption of [parent-child] immunity, society's view of the child, and the parent-child relationship, has changed radically.").

5. See *Eagan*, 347 Md. at 83, 698 A.2d at 1103 (stating that the circumstances warranting application of the *Mahnke* exception "do not necessarily arise merely because culpable conduct causes the death of a family member," and holding that therefore the *Mahnke* exception does not apply to every wrongful death case).

6. *Calhoun v. Eagan*, 111 Md. App. 362, 370, 681 A.2d 609, 612 (1996), *vacated*, 347 Md. 72, 698 A.2d 1097 (1997). Although John Calhoun told the police he was angry at his wife, he later testified that he kicked the ladder because he was angry with himself and his marital transgressions. *Id.* at 372, 681 A.2d at 614.

7. *Eagan*, 347 Md. at 77, 698 A.2d at 1100. The actual cause of Mrs. Calhoun's death was disputed at John Calhoun's criminal trial. *Eagan*, 111 Md. App. at 371-72, 681 A.2d at 613. A police detective testified that he believed Mrs. Calhoun's head wounds resulted from blows to the head from a blunt object rather than her fall from the ladder. *Id.* In contrast, the medical examiner concluded that Mrs. Calhoun died from head injuries sustained in her fall; however, he could not preclude the possibility that her injuries came from another source. *Id.* at 372, 681 A.2d at 613.

8. John Calhoun had CPR training. *Eagan*, 347 Md. at 78, 698 A.2d at 1100.

unattended for nearly ten hours.⁹ Furthermore, he prevented others from saving his wife by initially concealing her situation from the authorities and the couple's minor children, Laura and Kevin Calhoun.¹⁰ After Mrs. Calhoun's death was revealed, police questioned John Calhoun three times; each time he denied responsibility for his wife's death.¹¹ John Calhoun finally admitted to killing his wife, but he confessed only after police confronted him with damaging information.¹² Charged with several offenses, John Calhoun ultimately pled guilty to voluntary manslaughter and received a prison sentence of five years.¹³

James Eagan, the court-appointed guardian of Laura and Kevin Calhoun, filed a wrongful death claim against John Calhoun in the Circuit Court for Howard County.¹⁴ John Calhoun answered by asserting that the doctrine of parent-child immunity barred his children's claim for the wrongful death of their mother.¹⁵ In response, Eagan filed an amended complaint containing allegations intended to invoke a recognized exception to parent-child immunity.¹⁶ John Calhoun continued to assert the immunity defense in two motions for summary judgment and at trial through motions for judgment.¹⁷ The court denied the motions after finding that "the plaintiff had presented sufficient facts to place the case within the exception to the immunity doctrine set forth in *Mahnke v. Moore*,"¹⁸ which holds that parent-child immunity will not apply when a child suffers "injuries resulting from [a parent's] cruel and inhuman treatment or . . . malicious and wanton wrongs."¹⁹

9. *Id.*

10. *Id.* (noting the existence of "evidence that Gladys [Calhoun] did not die instantly from the fall but survived for some period of time").

11. *Id.*

12. *Id.* Shortly before her death, Gladys Calhoun foreshadowed her fate when she said to a coworker, "If I die suddenly, it won't be an accident. You don't know what [John] is capable of doing." *Eagan*, 111 Md. App. at 369, 681 A.2d at 612. John Calhoun possessed a motive to kill Gladys because he was having an affair with another woman and wanted a divorce, but worried about "the financial implications" of a divorce. *Eagan*, 347 Md. at 78, 698 A.2d at 1100.

13. *Eagan*, 347 Md. at 78, 698 A.2d at 1100.

14. *Id.* at 78-79, 698 A.2d at 1100-01.

15. *Id.* at 79, 698 A.2d at 1101.

16. *Id.* The amended complaint alleged John's conduct was "(1) intentional, outrageous, intolerable, without legal justification or excuse, influenced by hatred or spite, and performed in order to deliberately injure or cause damage to Gladys, or (2) so reckless, wanton or wilful as to be tantamount to an intentional disregard of Gladys's rights." *Id.*

17. *Id.*

18. *Id.*

19. *Mahnke v. Moore*, 197 Md. 61, 68, 77 A.2d 923, 926 (1951).

At the close of the trial, the jury was asked to decide three questions contained in the verdict sheet.²⁰ In response to the first question, the jury found that John Calhoun "committed a wrongful act that caused Gladys's death."²¹ The jury declined to answer the second question that asked whether John Calhoun's conduct was "atrocious, showed a complete abandonment of the parental relation, was intentional, wilful, or malicious."²² The court found the jury did not need to answer this question in order to proceed to the question of damages.²³ In response to the third question, which asked for the jury's assessment of damages, the jury awarded the children a total of \$2,360,000.²⁴

John Calhoun appealed the judgments to the Court of Special Appeals.²⁵ In considering whether parent-child immunity protected John, the court rejected Eagan's argument that the children's cause of action was not barred by the immunity doctrine because it derived from their mother, who would not have been barred from bringing suit.²⁶ The court found that a wrongful death action was personal to the children; therefore, parent-child immunity could be a defense to the children's wrongful death action.²⁷

The court then examined the exception to the immunity doctrine established in *Mahnke v. Moore* and determined that the critical question under *Mahnke* was whether John Calhoun's conduct objectively, rather than subjectively, indicated an abandonment of the parental relationship.²⁸ Rejecting John Calhoun's claim that the lower court erred when it denied his motions for judgment, the court identified sufficient facts to create a jury question as to the applicability of the *Mahnke* exception.²⁹ However, the court held that the jury did not determine the applicability of the *Mahnke* exception because it failed

20. *Eagan*, 347 Md. at 79, 698 A.2d at 1101.

21. *Id.*

22. *Id.* at 80, 698 A.2d at 1101.

23. *Id.*

24. *Id.* As compensation for the children's loss of the financial support of their mother, the jury awarded Laura Calhoun seventy thousand dollars and Kevin Calhoun ninety thousand dollars. *Id.* In addition to these economic damages, each child received one million dollars for "mental anguish, emotional pain, loss of society, companionship, comfort, protection, parental care, attention, advice, counsel, training, and guidance." *Id.* Finally, the jury awarded both children one hundred thousand dollars each for education expenses they could have reasonably expected their mother to pay. *Id.*

25. *Id.*

26. *Calhoun v. Eagan*, 111 Md. App. 362, 383, 681 A.2d 609, 619 (1996), *vacated*, 347 Md. 72, 698 A.2d 1097 (1997).

27. *Id.* at 385, 681 A.2d at 620.

28. *Id.* at 393, 681 A.2d at 624.

29. *Id.* at 398, 681 A.2d at 626.

to answer the second verdict sheet question.³⁰ Therefore, the court remanded the case for a new trial.³¹

Disappointed with this outcome, Eagan petitioned the Court of Appeals, which granted certiorari to consider whether the *Mahnke* exception applies as a matter of law to wrongful death actions based upon voluntary manslaughter.³²

2. *Legal Background.*—

a. The Creation of Parent-Child Immunity.—The doctrine of parent-child immunity precludes a tort action between a parent and a minor child for conduct resulting in personal injury.³³ The doctrine finds its origins in American jurisprudence, as English common law courts never recognized the doctrine.³⁴ At English common law, a child retained a legal identity distinct from her parents³⁵ and could therefore maintain a property action against them.³⁶ Although the English courts lacked an opportunity to specifically address whether a child possessed a right to recover for personal injuries,³⁷ treatises written by nineteenth century Englishmen provide a “glimpse” into “the state of the English mind” on the topic.³⁸ The unanimous view was that a child’s “right to redress” for a personal wrong was “beyond debate” and “the only doubtful question was whether a duty had been violated” by the parent.³⁹

The concept of parental immunity originated with the American judiciary in a series of cases known as “the great trilogy.”⁴⁰ The Mississippi Supreme Court was the first court to recognize parent-child im-

30. *Id.* at 398-400, 681 A.2d at 626-27.

31. *Id.* at 400, 681 A.2d at 628.

32. *Eagan*, 347 Md. at 74, 81, 698 A.2d at 1098, 1102.

33. See *Schneider v. Schneider*, 160 Md. 18, 22-23, 152 A. 498, 449-50 (1930) (adopting the doctrine of parent-child immunity for the first time in Maryland).

34. See *Mahnke v. Moore*, 197 Md. 61, 64, 77 A.2d 923, 924 (1951) (“[T]here is nothing in the English decisions to suggest that at common law a child could not sue a parent for a personal tort.”); *Dunlap v. Dunlap*, 150 A. 905, 906 (N.H. 1930) (“There has never been a common-law rule that a child could not sue its parents.”).

35. *Dunlap*, 150 A. at 906 (citing William E. McCurdy, *Torts Between Persons in Domestic Relation*, 43 HARV. L. REV. 1030, 1056 (1930)).

36. *Id.* at 907.

37. *Id.*

38. *Id.*

39. *Id.* at 907-08 (“[T]he view . . . held was that the capacity of the child to sue the parent for tort was so clear that it would be superfluous to do more than declare it.”).

40. Hollister, *supra* note 4, at 495 n.41 (quoting Edwin D. Akers & William H. Drummond, Comment, *Tort Actions Between Members of the Family—Husband & Wife—Parent & Child*, 26 MO. L. REV. 152, 182 (1961)).

munity.⁴¹ In *Hewlett v. George*,⁴² the court described two possible scenarios when a child sues a parent for personal injuries.⁴³ If “the parent is under obligation to care for, guide, and control [the child], and the child is under reciprocal obligation to aid and comfort and obey [the parent],” then the court will bar the child’s claim.⁴⁴ However, if the parent-child relationship is “dissolved,” the court noted that “it may be the child could successfully maintain an action against the parent for personal injuries.”⁴⁵ In the absence of precedent,⁴⁶ the court based its decision on social policy justifications.⁴⁷ The court described the parent-child relationship as imposing responsibilities on parent and child.⁴⁸ Because of this special relationship, the ability of a minor child to obtain civil redress for personal injuries caused by a parent would undermine “[t]he peace of society, and of the families composing society.”⁴⁹ According to the court, a child’s claim for protection from “parental violence and wrong-doing” could only be addressed by the criminal justice system.⁵⁰

Shortly thereafter, in *McKelvey v. McKelvey*,⁵¹ the Tennessee Supreme Court issued the second “trilogy” decision,⁵² which recognized parental immunity in a child’s action against her father and stepmother for cruel disciplinary punishment.⁵³ Drawing an analogy between parent-child and interspousal immunity, the court reasoned

41. *Id.* at 493-94.

42. 9 So. 885 (Miss. 1891). The Mississippi Reports spells the first party’s name in this case as “Hewlett” whereas the Southern Reporter spells the name as “Hewellette.” References to this case will follow the spelling used by the official state reporter.

43. *Id.* at 887. In this case a minor daughter brought a tort claim against her mother alleging malicious commitment to an insane asylum. *Id.* The daughter was married but living apart from her husband. *Id.* Because the factual record did not adequately address “[w]hether she had resumed her former place in her mother’s house, and the relationship . . . of a minor child to her parent,” the court remanded the case for consideration on this issue. *Id.*

44. *Id.*

45. *Id.*

46. Both commentators and the courts have noted the lack of authoritative support for the decision in *Hewlett*. See *Frye v. Frye*, 305 Md. 542, 545-46, 505 A.2d 826, 828 (1986) (noting the absence of “any judicial decision or any other authority” in support of the *Hewlett* decision, but that it was nevertheless adopted in Maryland); Hollister, *supra* note 4, at 494 (noting that the *Hewlett* court “neither cited authority for [its] holding, nor gave any further explanation of its reasoning”).

47. *Hewlett*, 9 So. at 887.

48. *Id.*

49. *Id.*

50. *Id.*

51. 77 S.W. 664 (Tenn. 1903).

52. Hollister, *supra* note 4, at 495 n.41 (quoting *Akers & Drummond*, *supra* note 40, at 182).

53. *McKelvey*, 77 S.W. at 664.

that society not only required, but expected both the wife and child to obey the husband and father.⁵⁴ In pursuit of obedience, the parent's "right to control [his child] involved the subordinate right to restrain and inflict moderate chastisement upon the child."⁵⁵ Consequently, the court reasoned that injuries resulting from punishment for the child's failure to obey her parents did not provide the child with a cause of action.⁵⁶

In *Roller v. Roller*,⁵⁷ the final decision in the trilogy,⁵⁸ the Washington Supreme Court held that a daughter could not maintain a cause of action against her father for rape.⁵⁹ In its refusal to permit this tort action, the court expressed its fear that permitting an action for a "heinous crime" would lead it down a slippery slope toward permitting an action for a tort of a less "heinous" nature.⁶⁰ The court also raised the possibility that, if damages were recovered, the tortfeasor parent might profit from his crime because he might inherit these damages if his child died before him.⁶¹ In addition, the child's recovery of damages from the parent threatens the financial resources available to the other children in the family.⁶² The court noted that this drain on family resources also threatens society because society will bear the burden of supporting the other children if family resources are inadequate.⁶³

The justifications for parent-child immunity asserted by this trilogy of cases form the cornerstone of subsequent decisions, including those in Maryland, which created and maintained the parent-child immunity doctrine.

54. *Id.* at 665.

55. *Id.* at 664 (noting that the right to control a child "grew out of the corresponding duty . . . to maintain, protect, and educate it").

56. *Id.*

57. 79 P. 788 (Wash. 1905).

58. Hollister, *supra* note 4, at 495 n.41 (quoting Akers & Drummond, *supra* note 40, at 182).

59. *Roller*, 79 P. at 789.

60. *Id.* The court noted:

[I]f it be once established that a child has a right to sue a parent for a tort, there is no practical line of demarkation which can be drawn, for the same principle which would allow the action in the case of a heinous crime . . . would allow an action to be brought for any other tort.

Id.

61. *Id.*

62. *Id.*

63. *Id.*

b. *Maryland Adopts and Then Limits Parent-Child Immunity.*—In *Schneider v. Schneider*,⁶⁴ the Maryland Court of Appeals joined those states that had “blindly” adopted the doctrine of parent-child immunity.⁶⁵ In *Schneider*, a mother sued her minor son for injuries received while she was a passenger and her son was the driver of an automobile involved in an accident.⁶⁶ The court emphasized that allowing a parent to sue her child places the parent in the perplexing and contradictory position of playing both plaintiff and defendant in the same suit.⁶⁷ Reasoning that the “antagonisms” inherent in such a suit threaten the preservation of the family,⁶⁸ the court established a mutual immunity preventing parents and children from maintaining civil suits for personal injuries against each other.⁶⁹

Since establishing parent-child immunity, the Court of Appeals has been notably reluctant to alter the doctrine⁷⁰ and has limited it on only three occasions. Twenty-one years after adopting the doctrine, the court recognized the first exception in *Mahnke v. Moore*.⁷¹ In *Mahnke*, a child sued her father’s estate to recover for personal injuries sustained when her father murdered her mother and then com-

64. 160 Md. 18, 152 A. 498 (1930).

65. *Id.* at 23-24, 152 A. at 500; *see also* *Frye v. Frye*, 305 Md. 542, 545, 505 A.2d 826, 828 (1986) (stating that numerous jurisdictions “blindly followed” the doctrine of parent-child immunity created by the *Hewlett* court without any authoritative precedent).

66. *Schneider*, 160 Md. at 19-20, 152 A. at 498.

67. *Id.* at 22-23, 152 A. at 499-500. In a suit by a parent against her child the parent plays opposing roles because a minor cannot represent himself in a suit and a parent is typically appointed guardian ad litem for the purpose of representing the minor in the suit. *Id.* at 23, 152 A. at 500. Consequently, a parent who is charged with protecting her minor child’s person and property would defend her child in a suit she instituted. *Id.* Appointing someone other than the parent as guardian does not resolve this conflict because “the natural dependence of the child on the parent would inevitably leave him largely subject to the parent’s guidance and direction.” *Id.*

68. *Id.* at 23-24, 152 A. at 500 (“Both natural and politic law, morality, and the precepts of revealed religion alike demand the preservation of [the family relationship] in its full strength and purity.” (internal quotation marks omitted) (quoting JAMES SCHOULER, A TREATISE ON THE LAW OF THE DOMESTIC RELATIONS § 223, at 345 (1898))).

69. *Id.*; *see also* *Frye*, 305 Md. at 546, 505 A.2d at 828 (“[In *Schneider*,] this Court broadened the *Hewlett* rule that a minor child has no right to assert any claim to civil redress for personal injuries suffered at the hands of the parents So the rule was construed as applying not only to actions by the minor child against the parent, but also to suits by the parent against the minor child.”).

70. *See, e.g.*, *Renko v. McLean*, 346 Md. 464, 471-81, 697 A.2d 468, 471-76 (1997) (refusing to abrogate parent-child immunity to allow an emancipated child to sue her parents for injuries received in an automobile accident which occurred when she was unemancipated); *Warren v. Warren*, 336 Md. 618, 627-28, 650 A.2d 252, 256-57 (1994) (refusing to create an exception for motor vehicle torts or to extend the protection of parent-child immunity to step-parents); *Frye*, 305 Md. at 567, 505 A.2d at 839 (upholding the application of parent-child immunity to negligence and motor vehicle tort actions).

71. 197 Md. 61, 77 A.2d 923 (1951).

mitted suicide in her presence.⁷² The court reasoned that the policy of granting immunity in order to maintain discipline in the home no longer applied when a parent committed acts that demonstrated a "complete abandonment of the parental relation."⁷³ While upholding parental immunity for negligence, the Court of Appeals held that a minor "child shall have a right of action against a parent for injuries resulting from cruel and inhuman treatment or for malicious and wanton wrongs."⁷⁴

In *Waltzinger v. Birsner*,⁷⁵ the Court of Appeals recognized a second exception to the parent-child immunity doctrine. In *Waltzinger*, a mother sued her adult son for injuries resulting from his negligent operation of an automobile.⁷⁶ The court distinguished these facts from those in *Schneider*, in which a mother sued her minor son and the court applied parent-child immunity as a bar to the suit.⁷⁷ The *Waltzinger* court reasoned that the need for parental discretion was missing in a relationship between a parent and an adult child.⁷⁸ Furthermore, a parent of an adult child does not have a duty to support the child.⁷⁹ Relying on these justifications, the court held that a parent can maintain a suit against a child who was emancipated when his tortious conduct injured his parent.⁸⁰

Finally, in *Hatzinicholas v. Protopapas*,⁸¹ the Court of Appeals considered whether a minor could maintain an action against a parent's business partner.⁸² In *Hatzinicholas*, a child sued her father's partner-

72. *Id.* at 63, 77 A.2d at 924. In *Mahnke*, the court described in detail the terrifying experience of a five-year old child. *Id.* With his child watching, a father shot his child's mother, "thereby blowing away the right side of her head, a portion of her skull coming to rest on the kitchen table, and her body collapsing backward over a chair with her head resting in one pool of blood and her feet resting in another." *Id.* After keeping his child with her mother's dead body for seven days, the father "committed suicide in [the child's] presence by shooting himself with a shotgun, thereby causing masses of his blood to lodge upon her face and clothing." *Id.*

73. *Id.* at 68, 77 A.2d at 926.

74. *Id.* ("Ordinarily, the parent is not liable for damages to the child for a failure to perform a parental duty, or for excessive punishment of the child not maliciously inflicted, or for negligent disrepair of the home provided by the father.").

75. 212 Md. 107, 128 A.2d 617 (1957).

76. *Id.* at 111-12, 128 A.2d at 618-19. The son left his car with his mother inside in the backseat. When the car began to roll down the driveway, his mother was injured as she attempted to maneuver into the front to set the car brake. *Id.*

77. *Id.* at 125, 128 A.2d at 626.

78. *Id.* at 126, 128 A.2d at 627.

79. *See id.* (noting that the adult son was not "entitled to receive any services from [his mother]").

80. *Id.*

81. 314 Md. 340, 550 A.2d 947 (1988).

82. *Id.* at 341, 550 A.2d at 948.

ship after she was injured by a slicing machine on the premises of her father's partnership business.⁸³ The court noted that the fundamental premise of the parent-child immunity doctrine is "the protection of family integrity and harmony and the protection of parental discretion in the discipline and care of the child."⁸⁴ The court found that neither of these concerns are "significantly impaired" by a child's suit against a parent's partner.⁸⁵ The Court of Appeals created a third exception to the parent-child immunity doctrine by holding that it does not preclude a child's suit against a parent's partner because the policy rationales for the doctrine do not support its application to the partnership relationship.⁸⁶

In the seventy years since *Schneider*, Maryland courts have rejected requests to create additional exceptions to the parent-child immunity doctrine.⁸⁷ These decisions have given the courts ample opportunity to enunciate the rationales underlying the doctrine of parent-child immunity.⁸⁸ The rationales advanced share the ultimate goal of preserving the family relationship.⁸⁹ A rationale frequently cited is the public's interest in protecting "family integrity and harmony."⁹⁰ According to this rationale, tort actions between parent and child introduce potentially destructive elements of discord into the family unit.⁹¹ Thus, by preventing these actions, the immunity doctrine preserves the family unit.⁹²

A second rationale asserted in support of parent-child immunity is the need to protect the ability of parents to discipline and control

83. *Id.* at 342-43, 550 A.2d at 948.

84. *Id.* at 357, 550 A.2d at 955 (internal quotation marks omitted) (quoting *Frye v. Frye*, 305 Md. 542, 551, 505 A.2d 826, 831 (1986)).

85. *Id.* at 358, 550 A.2d at 956. The court conceded that a child's suit against a parent's partner "may impair, or even destroy" the partnership relationship. *Id.* However, the court noted parent-child immunity was not created to protect the partnership relationship. *Id.*

86. *Id.*

87. See *supra* note 70 (citing decisions of the Court of Appeals refusing requests to modify or abrogate the parent-child immunity rule); see also *Shell Oil Co. v. Ryckman*, 43 Md. App. 1, 4, 403 A.2d 379, 381 (1979) (refusing to recognize a "business exception" to parent-child immunity for a minor child injured while working as an employee of a parent).

88. See, e.g., *Warren v. Warren*, 336 Md. 618, 625, 650 A.2d 252, 255 (1994) (summarizing the policy justifications for parent-child immunity).

89. See *Frye*, 305 Md. at 548, 505 A.2d at 829 ("The rule is founded upon the relation in which the parent and the unemancipated minor child stand to each other.").

90. *Id.* at 551, 505 A.2d at 831.

91. See *Waltzinger v. Birsner*, 212 Md. 107, 126, 128 A.2d 617, 627 (1956) (stating that tort actions between parent and child "would disrupt and destroy the peace and harmony of the home").

92. See *Frye*, 305 Md. at 552, 505 A.2d at 831.

their children.⁹³ Allowing children to challenge these discretionary decisions regarding child rearing undermines parental authority because:

[t]he level of parental guidance necessary to rear responsible, productive members of society simply cannot be attained in a situation where parents must constantly weigh the benefit of helping a child to understand an important lesson against the looming specter of being hauled into court by an opportunistic attorney for the child.⁹⁴

Since both the child and the law depend upon the parent to fulfill his parental duties, the parent should be able to carry out this responsibility "free and unfettered."⁹⁵

A third rationale advanced by Maryland courts for the immunity relates to the public's interest in preventing fraudulent and collusive claims between the injured individual and the insured, who are both family members.⁹⁶ While the possibility of fraud and collusion is present in all liability insurance actions, this possibility is "'considerably increased'" when a child sues a parent.⁹⁷ In these suits, the "insured has every incentive to lose"⁹⁸ because the proceeds of the recovery flow to the insured's child and thereby reduce the amount of funds the insured must contribute to support his child.⁹⁹ This incentive on the part of the insured may damage the insurer's ability to litigate its case because the insurer "may not receive the necessary cooperation from a family defendant in providing adequate information for the insured's defense, [and] a defendant may be too helpful to the plaintiff family member and may prejudice the jury by his statements."¹⁰⁰ Moreover, a child is particularly susceptible to his parent's influ-

93. See *id.* at 551, 505 A.2d at 831; see also *Warren*, 336 Md. at 626, 650 A.2d at 255-56 ("We are not willing to open the door to rebellious children and frustrated parents and allow the courts to become the arbitrator of parent-child disputes and the overseer of parental decisions.").

94. *Warren*, 336 Md. at 626, 650 A.2d at 255-56 (quoting *Glaskox v. Glaskox*, 614 So. 2d 906, 913 (Miss. 1992) (en banc) (Lee, J., dissenting)).

95. *Frye*, 305 Md. at 551, 505 A.2d at 831.

96. See *Warren*, 336 Md. at 625, 650 A.2d at 255 (citing the "prevention of fraud and collusion" as a policy justification for parent-child immunity).

97. *Latz v. Latz*, 10 Md. App. 720, 733 n.13, 272 A.2d 435, 442 n.13 (1971) (quoting WILLIAM L. PROSSER, *THE LAW OF TORTS* § 116, at 889 (3d ed. 1964)).

98. *Renko v. McLean*, 346 Md. 464, 478, 697 A.2d 468, 475 (1997).

99. See *Hollister*, *supra* note 4, at 500-01 ("There can be no doubt that when insurance will pay for all or part of the plaintiff's recovery there is an incentive for family members to conspire to obtain an unjustified award at the expense of the insurance company.").

100. *Frye*, 305 Md. at 566, 505 A.2d at 838.

ences¹⁰¹ and a parent may pressure the child into participating in fraudulent and collusive claims.

A fourth rationale advanced for the doctrine of parent-child immunity concerns the allegedly draining effect on family resources that is caused by a child's suit against a parent.¹⁰² This rationale asserts that recovery of damages by an injured child "might potentially saddle a family with a judgment that they can ill-afford to pay because . . . it exceeds available insurance."¹⁰³ While such a judgment would benefit the injured child, it would be to the detriment of the other innocent family members.¹⁰⁴

The final rationale for parent-child immunity concerns the possibility of a parent-tortfeasor benefiting from the monetary damages awarded to the child if the child dies before the parent and the parent inherits the damages.¹⁰⁵

c. The Wrongful Death Action.—At common law, a civil action for damages against a tortfeasor who caused the death of another "abated upon the death of the person thus injured."¹⁰⁶ This led to the odd outcome that the tortfeasor who injured another could be held civilly liable whereas the tortfeasor who caused the death of another escaped civil liability.¹⁰⁷ England remedied this problem in 1846 with passage of the Fatal Accident Act, commonly known as Lord Campbell's Act.¹⁰⁸

Six years later, the Maryland legislature followed England's lead¹⁰⁹ and adopted the Wrongful Death Act,¹¹⁰ which creates a cause

101. *Cf. Schneider v. Schneider*, 160 Md. 18, 23, 152 A. 498, 499 (1930) ("[T]he natural dependence of the child on the parent would inevitably leave him largely subject to the parent's guidance and direction.").

102. *See Warren v. Warren*, 336 Md. 618, 625, 650 A.2d 252, 255 (1994) (citing "the threat that litigation will deplete family resources" as a policy justification for parent-child immunity).

103. *Renko*, 346 Md. at 480, 697 A.2d at 476.

104. *Id.*

105. *See Roller v. Roller*, 79 P. 788, 789 (Wash. 1905) (stating that a common sense rationale for parent-child immunity is that "if a child should recover a judgment from a parent, in the event of its death the parent would become heir to the very property which had been wrested by the law away from him").

106. *Stewart v. United Elec. Light & Power Co.*, 104 Md. 332, 333, 65 A. 49, 50 (1906).

107. *W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS* § 127, at 945 (5th ed. 1984) (stating that at common law "it was cheaper for the defendant to kill the plaintiff than to injure him, and that the most grievous of all injuries left the bereaved family of the victim, who frequently were destitute, without a remedy").

108. *Id.*

109. *See Stewart*, 104 Md. at 334, 65 A. 49 at 50 (describing Maryland's Wrongful Death Act as "almost a literal transcript of Lord Campbell's Act").

110. MD. CODE ANN., CTS. & JUD. PROC. §§ 3-901 to -904 (1995 & Supp. 1998).

of action against a tortfeasor "whose wrongful act causes the death of another."¹¹¹ The Act "created a new cause of action for something for which the deceased person never had, and never could have had [at common law which was] the right to sue . . . [for] the injury resulting from his death."¹¹² This right of action belongs to certain designated individuals called "primary beneficiaries," which include the decedent's wife, husband, parent, and child.¹¹³ If no person qualifies as a "primary beneficiary," a person "related to the deceased person by blood or marriage" and "substantially dependent upon the deceased" may bring a wrongful death suit.¹¹⁴ Although the Act provides for two classes of beneficiaries, only one class may recover, and the primary class has priority.¹¹⁵ The beneficiaries in a wrongful death action can recover damages measured in terms of economic, and possibly noneconomic, losses occasioned by the death of the deceased.¹¹⁶

The Wrongful Death Act places a prerequisite on the right of beneficiaries to file a wrongful death suit against a tortfeasor. For beneficiaries to bring a wrongful death action, the decedent must have been able "to maintain an action *and* recover damages if death had not ensued."¹¹⁷ Consequently, any defense that would have blocked the decedent's action for damages, such as parent-child immunity, similarly blocks the beneficiaries' cause of action.¹¹⁸ In *Smith v. Gross*,¹¹⁹ the Court of Appeals held that parent-child immunity bars a wrongful death action brought by one parent of a deceased minor

111. *Id.* § 3-902(a).

112. *Stewart*, 104 Md. at 341, 65 A. 49 at 53 (internal quotation marks omitted) (quoting *Tucker v. State ex rel. Johnson*, 89 Md. 471, 479, 43 A. 778, 780 (1899)).

113. CTS. & JUD. PROC. § 3-904(a) (Supp. 1998).

114. *Id.* § 3-904(b).

115. *See id.* (providing a cause of action to "secondary beneficiaries" only if there are no persons who qualify as "primary beneficiaries"); *see also Flores v. King*, 13 Md. App. 270, 274, 282 A.2d 521, 523 (1971) (interpreting the Wrongful Death Act as "disjunctive and not conjunctive," providing a cause of action for wrongful death to only one of the two classes of beneficiaries).

116. *See* CTS. & JUD. PROC. § 3-904(c), (d). Damages for noneconomic losses, or solatium damages, include "mental anguish, emotional pain and suffering, loss of society, companionship, comfort, protection, marital care, parental care, filial care, attention, advice, counsel, training, guidance, or education where applicable." *Id.* § 3-904(d).

117. *Id.* § 3-901(e) (emphasis added).

118. *See Smith v. Gross*, 319 Md. 138, 148-49, 571 A.2d 1219, 1224 (1990) (holding that parent-child immunity is a defense to a mother's wrongful death action against a father for the death of their minor child); *Frazee v. Baltimore Gas & Elec. Co.*, 255 Md. 627, 633, 258 A.2d 425, 428 (1969) (holding that the contributory negligence of the decedent is a defense to a wrongful death action); *Baltimore & Potomac R.R. Co. v. State ex rel. Abbot*, 75 Md. 152, 159, 23 A. 310, 311 (1892) (holding that assumption of risk by the decedent is a defense to a wrongful death action).

119. 319 Md. 138, 571 A.2d 1219 (1990).

against the other parent.¹²⁰ The court explained that the defense of parent-child immunity was not excepted from the general rule that defenses against the decedent are defenses to a wrongful death action because “[i]f the legislature intended that the judicially created parent-child immunity rule be excepted from the legislatively created . . . wrongful death action[], it has had ample opportunity to say so.”¹²¹ The court refused to create an exception to the immunity rule based upon the death of a child.¹²²

3. *The Court’s Reasoning.*—In *Eagan v. Calhoun*, the Court of Appeals firmly adhered to its resolve to retain the doctrine of parent-child immunity.¹²³ Furthermore, the court concluded that the doctrine may be invoked as an absolute defense in wrongful death actions.¹²⁴ However, the court held that if the wrongful death action is based on the murder or voluntary manslaughter of one parent by the other, as opposed to mere negligence, parent-child immunity “should not apply as a matter of law.”¹²⁵

The court began its discussion by flatly rejecting Eagan’s request to completely abrogate the doctrine of parental immunity.¹²⁶ Next, the court addressed Eagan’s argument that parental immunity did not bar the children’s wrongful death action because the action derived from their mother, who could have commenced the suit and recovered damages had she lived.¹²⁷ In rejecting this argument, the court distinguished between survival and wrongful death actions based upon who files the suit and the yardstick used to measure damages.¹²⁸ While a survival action is brought by the decedent’s personal representative, a wrongful death action is brought by a spouse, parent, or

120. *Id.* at 149, 571 A.2d at 1224. In *Smith*, a mother sued a father for the death of their minor son in an automobile accident. *Id.* at 141, 571 A.2d at 1220.

121. *Id.* at 144, 149, 571 A.2d at 1221, 1224.

122. *Id.* at 150, 571 A.2d at 1224. In his dissent, Judge Eldridge persuasively argued that the parent-child immunity rule should not apply to wrongful death claims when the death of a child removed the need to protect family harmony and discipline. *Id.* at 154, 571 A.2d at 1226 (Eldridge, J., dissenting).

123. *Eagan*, 347 Md. at 81, 698 A.2d at 1102.

124. *Id.* at 82, 698 A.2d at 1102.

125. *Id.* at 84, 698 A.2d at 1103.

126. *Id.* at 81, 698 A.2d at 1102. The court refused to revisit the question of the viability of the parent-child immunity doctrine in light of its recent consideration of this question in *Renko v. McLean*, 346 Md. 464, 697 A.2d 468 (1997). *Eagan*, 317 Md. at 81, 698 A.2d at 1102.

127. *Id.*

128. *Id.* at 82, 698 A.2d at 1102. For a discussion of the differences between the survival and wrongful death actions, see *Smith v. Gray Concrete Pipe Co.*, 267 Md. 149, 158-59, 297 A.2d 721, 727 (1972), and *Stewart v. United Electric Light & Power Co.*, 104 Md. 332, 65 A. 49 (1906).

child.¹²⁹ In a survival action, the measure of damages is the injury to the decedent, whereas in a wrongful death action, the measure is the claimant's own personal loss ensuing from the loss of the decedent.¹³⁰ Characterizing the wrongful death action as "personal . . . to the claimant," the court held that because Eagan stood "in the stead of" the children, his wrongful death action could be barred by the immunity defense.¹³¹

Having determined that Eagan's claim could be barred by the immunity doctrine, the court turned to the question whether the case fell within an exception to the doctrine of parental immunity.¹³² Explicitly declining to apply the *Mahnke* exception¹³³ to all wrongful death cases, the court noted that "[t]ragic deaths often arise from acts of negligence or excessive, but non-willful, behavior on the part of family members . . . and although such tragedies may well put a serious strain on some of the family relationships, they do not generally destroy a parent-child relationship."¹³⁴ However, the court held that when the wrongful death action arises from the murder or voluntary manslaughter of one parent by the other, parental immunity does not bar the action as a matter of law.¹³⁵ The court emphasized that when a parent kills a child's other parent, the public policies underlying the parent-child immunity doctrine disappear.¹³⁶ By his actions, the tortfeasor-parent legally abandons the parental relationship and destroys family harmony, even if he continues to provide for the care of his children and intends to reunite with them after serving his criminal sentence.¹³⁷ Therefore, the court found that when the reasons underlying the immunity no longer exist, the need for the immunity similarly disappears.¹³⁸ The court reasoned that this position is consis-

129. *Eagan*, 347 Md. at 82, 698 A.2d at 1102.

130. *Id.*

131. *Id.* at 82-83, 698 A.2d at 1102-03.

132. *Id.* at 83, 698 A.2d at 1103.

133. See *supra* text accompanying notes 73-74 (stating the exception established by *Mahnke*).

134. *Eagan*, 347 Md. at 83, 698 A.2d at 1103. In the case of deaths resulting from the negligent operation of an automobile, the courts have upheld the application of parent-child immunity. See, e.g., *Smith v. Gross*, 319 Md. 138, 148-49, 571 A.2d 1219, 1224 (1990) (holding parent-child immunity barred survival and wrongful death actions against a father for the death of his son in an automobile accident caused by the father's negligence); *Latz v. Latz*, 10 Md. App. 720, 725, 272 A.2d 435, 438 (1971) (holding parent-child immunity barred a father's suit against a minor daughter for the death of her mother due to the daughter's negligent driving).

135. *Eagan*, 347 Md. at 84, 698 A.2d at 1103.

136. *Id.* at 85, 698 A.2d at 1104.

137. *Id.* at 84-85, 698 A.2d at 1103-04.

138. *Id.*

tent with *Mahnke* because “[t]he murder or voluntary manslaughter of a spouse or child by a parent necessarily constitutes cruel and inhuman treatment, not just of the person killed but of the other family members as well.”¹³⁹ Furthermore, allowing a child to bring a suit for damages in this situation is consistent with the “slayer’s rule,” which asserts that persons should not profit from the murder or voluntary manslaughter of another.¹⁴⁰

Finally, the court considered whether John Calhoun’s conduct causing his wife’s death was intentional, which the court found to hinge upon his “mental state.”¹⁴¹ If Calhoun intended to kill his wife, he would be guilty of murder or voluntary manslaughter and parent-child immunity would not apply.¹⁴² Because his state of mind was disputed,¹⁴³ it would normally be the jury’s task to determine this issue on remand.¹⁴⁴ However, the court’s use of the record, along with the motions filed by Calhoun, “spared” the lower court from having to hold a new trial.¹⁴⁵ The court concluded that Calhoun’s guilty plea to the charge of voluntary manslaughter constituted an admission, albeit a rebuttable one, of his *mens rea*.¹⁴⁶ Moreover, Calhoun’s concession in the wrongful death action that he was guilty of voluntary manslaughter¹⁴⁷ estopped him from rebutting the guilty plea.¹⁴⁸ This un-rebutted guilty plea established the killing as voluntary

139. *Id.* at 85, 698 A.2d at 1103-04.

140. *Id.*, 698 A.2d at 1103. The slayer’s rule evolved in Maryland from three decisions: *Schifanelli v. Wallace*, 271 Md. 177, 315 A.2d 513 (1974), *Chase v. Jenifer*, 219 Md. 564, 150 A.2d 251 (1959), and *Price v. Hitaffer*, 164 Md. 505, 165 A. 470 (1933). In its present form, the rule provides:

(1) [A] person who kills another may not share in the distribution of the decedent’s estate, either as an heir or as a beneficiary under a will, and may not, as a beneficiary, collect the proceeds under an insurance policy on the decedent’s life “when the homicide is felonious and intentional,” and (2) the person may share in the distribution and may collect life insurance proceeds “when the homicide is unintentional even though it is the result of such gross negligence as would render the killer criminally guilty of involuntary manslaughter.”

Eagan, 347 Md. at 85, 698 A.2d at 1104 (quoting *Ford v. Ford*, 307 Md. 105, 111-12, 512 A.2d 389, 392 (1986)).

141. *Eagan*, 347 Md. at 86, 698 A.2d at 1104.

142. *Id.*

143. *Id.*; see *supra* note 6 (describing the evidence on Calhoun’s state of mind).

144. *Eagan*, 347 Md. at 86, 698 A.2d at 1104.

145. *Id.*

146. *Id.* at 87, 698 A.2d at 1105.

147. *Id.* In a memorandum of law attached to his affidavit that was filed in support of his motion for summary judgment in the wrongful death action, Calhoun stated the following through his attorney:

In the case of JOHN C. CALHOUN, the death of GLADYS ESTHER CALHOUN was homicide, homicide was *voluntary manslaughter*, Mr. Calhoun was the *criminal agent*, he was not adjudicated *insane* by the court. He was convicted of *voluntary*

manslaughter.¹⁴⁹ Therefore, the court applied the *Mahnke* exception as a matter of law, barred the imposition of parent-child immunity, and upheld the jury's verdict against Calhoun.¹⁵⁰

4. *Analysis.*—In *Eagan v. Calhoun*, the Court of Appeals refused to abrogate the doctrine of parent-child immunity or to create a general exception for wrongful death actions. The holding fails to recognize the rights of children in two related respects. First, by refusing to recognize that the policies underlying the immunity no longer support application of the rule, the court improperly denies a child a cause of action against a parent based upon an outdated rule. Second, by declining to create an exception for wrongful death actions, a child's well-being is sacrificed for the second time, the first occurring when one parent died as a result of the other parent's conduct.

a. *Underlying Policies No Longer Support the Doctrine.*—Parent-child immunity is a doctrine predicated on social policies. If the policies no longer support the doctrine, there is no basis for the doctrine's existence. After examining the policy justifications for the immunity, courts in other states as well as commentators have found that the policies do not withstand scrutiny.¹⁵¹ Because the parent-child immunity rule contradicts the general rule of liability for wrongdoing, sound policies must exist for the immunity.¹⁵² An analysis of

manslaughter and incarcerated. The elements are prima facie within the ambit of the slayer's rule.

Id. This memorandum of law was originally filed by Calhoun's attorney in a custody proceeding for his children. *Id.*

148. *Id.* at 87-88, 698 A.2d at 1105. Maryland has embraced the principle of estoppel by admission, which holds that:

a party will not be permitted to maintain inconsistent positions or to take a position in regard to a matter which is directly contrary to, or inconsistent with, one previously assumed by him, at least where he had, or was chargeable with, full knowledge of the facts, and another will be prejudiced by his action.

Id. at 88, 698 A.2d at 1105 (quoting 28 AM. JUR. 2D *Estoppel and Waiver* § 68, at 694-95 (1966)).

149. *Id.* at 88, 698 A.2d at 1105.

150. *Id.*

151. The debate concerning the future of parent-child immunity clearly illustrates Prosser's observation that "the law of torts is a battleground of social theory." KEETON ET AL., *supra* note 107, § 103, at 15; see cases cited *infra* notes 154-160, 163-164, 168-169, 172-174, 178-179; see also Hollister, *supra* note 4, at 496-508 (criticizing the rationales advanced in support of parent-child immunity). But see *Frye v. Frye*, 305 Md. 542, 565, 505 A.2d 826, 838 (1986) ("Even in the light of changed conditions and increased knowledge, the [parent-child immunity] rule has not become fundamentally unsound in the circumstances of modern life. It is not a vestige of the past, no longer suitable to our people.").

152. See *Dunlap v. Dunlap*, 150 A. 905, 909 (N.H. 1930) (stating that parent-child immunity "should not be tolerated at all except for very strong reasons").

the policies enumerated in support of the immunity reveals that they are not convincing and, therefore, parent-child immunity should be completely abrogated.

A significant justification for parent-child immunity is the public policy goal of maintaining and preserving family harmony.¹⁵³ The crux of this argument is that precluding tort actions between parent and child prevents the introduction of the disharmony associated with a lawsuit into the family relationship. However, this argument is illusory because the conduct underlying the lawsuit, rather than the lawsuit itself, disturbs family tranquility.¹⁵⁴ Tranquility and harmony can only be returned to the family by permitting the injured child to bring a claim against the wrongdoer for damages.¹⁵⁵

Furthermore, the family harmony rationale does not explain the absurdity of denying children civil redress for personal injuries inflicted by their parents while simultaneously permitting suits against parents by children to protect their property and contract rights.¹⁵⁶ This discrepancy is particularly troublesome since courts have indicated that "some of the most bitter disputes arise over property."¹⁵⁷ Nor have the courts adequately explained why a suit between a parent

153. See *supra* notes 90-92 and accompanying text (discussing the "family harmony" justification).

154. See *Guess v. Gulf Ins. Co.*, 627 P.2d 869, 871 (N.M. 1981) ("The arguments that family relationships will be weakened or destroyed by bringing a lawsuit is not persuasive. The relationships will be affected to a much greater extent by the conduct between the parties that causes the lawsuit to be filed."); *Kirchner v. Crystal*, 474 N.E.2d 275, 277 (Ohio 1984) ("If any disruption to family harmony or tranquility occurs, it is more likely to happen as a result of tortious conduct, rather than as a result of allowing redress of the wrongful actions which led to injury."); *Falco v. Pados*, 282 A.2d 351, 355 (Pa. 1971) ("The speculative theory of family disruption upon which the doctrine of parental immunity is largely based has been criticized and rejected by legal scholars without exception. As they point out, it is the injury itself which is the disruptive act . . .").

155. See *Gelbman v. Gelbman*, 245 N.E.2d 192, 193 (N.Y. 1969) (observing that "family unity can only be preserved" by allowing a mother to sue her unemancipated son for injuries she sustained as a passenger in a car he was driving).

156. See *Rousey v. Rousey*, 528 A.2d 416, 418 (D.C. 1987) (en banc) ("An action to enforce property or contract rights is surely no less adversarial than an action in tort, and in theory, at least, it would present the same threat to family harmony."); *Glaskox v. Glaskox*, 614 So. 2d 906, 911 (Miss. 1992) (en banc) ("No sound justification appears for the fact that the law protects a minor's contract or property rights, but offers no redress to the child for injury to his person." (citing *Streenz v. Streenz*, 471 P.2d 282 (Ariz. 1970) (in banc))); *Gelbman*, 245 N.E.2d at 193 (noting that parent-child suits involving contracts, wills, and inheritances have been maintained).

157. See *Glaskox*, 614 So. 2d at 911 (citing *Lee v. Comer*, 224 S.E.2d 721, 723 (W. Va. 1976)).

and a minor child is any more disturbing to domestic tranquility than a suit between a parent and an adult child.¹⁵⁸

The existence of liability insurance further undermines the family harmony rationale. When a parent carries an insurance policy, an action between a parent and child does not place them in adversarial roles and therefore does not disturb family harmony because the insurance carrier defends the tortfeasor.¹⁵⁹ Additionally, the presence of insurance may alleviate the financial and emotional burden on the family by providing an outside source of funding for the child's injuries.¹⁶⁰

The second justification for parent-child immunity asserts that the immunity preserves the authority of a parent to discipline and control the child.¹⁶¹ The United States Supreme Court has affirmed the rights of parents to raise their children in the manner that they choose.¹⁶² Nevertheless, "a blanket rule of immunity" is not justified merely because a parent may be acting within parental authority.¹⁶³ Furthermore, the discipline and control justification reflects the outdated principle that a master can only control his servant if the servant is completely subordinated to the will of the master.¹⁶⁴ Similarly, to build a successful family relationship, parents and society do not need to treat children as an inferior group.¹⁶⁵ Children will not revolt against their parents merely because they possess the right to civil re-

158. See *Gelbman*, 245 N.E.2d at 194. The *Gelbman* court cited with approval the dissenting opinion in *Badigan v. Badigan*, 174 N.E.2d 718, 720 (N.Y. 1961) (Fuld, J., dissenting). *Id.* at 193 (citing *Badigan*, 174 N.E.2d at 721 (Fuld, J., dissenting)). In his dissent in *Badigan*, Judge Fuld argued that "[i]f filial duty or family peace is the test, it is impossible to understand why a distinction should be made between minor children and those who are adult. The Biblical command, 'Honor thy father and thy mother,' does not end at 21." *Badigan*, 174 N.E.2d at 721 (Fuld, J., dissenting).

159. See *Sorensen v. Sorensen*, 339 N.E.2d 907, 914 (Mass. 1975) (recognizing that the parties to the litigation are actually the child and the parent's insurance company, not the parent and the child); *Gelbman*, 245 N.E.2d at 193-94 (same).

160. See *Rousey*, 528 A.2d at 420; *Sorensen*, 339 N.E.2d at 914.

161. See *supra* notes 93-95 and accompanying text (discussing the "discipline and control" justification).

162. See *Hollister*, *supra* note 4, at 505 n.109 (noting that "the parents' right to raise their children, even when they elect to do so in an unorthodox manner" is constitutionally protected (citing *Bellotti v. Baird*, 443 U.S. 622 (1979); *Quilloin v. Walcott*, 434 U.S. 246 (1978); *Wisconsin v. Yoder*, 406 U.S. 205 (1972); *Prince v. Massachusetts*, 321 U.S. 158 (1944))).

163. *Gibson v. Gibson*, 479 P.2d 648, 652 (Cal. 1971) (in bank).

164. *Dunlap v. Dunlap*, 150 A. 905, 910 (N.H. 1930).

165. See *id.* ("In this age it can hardly be necessary or even desirable that the child be reared in the atmosphere of one under the control of an absolute tyrant.").

dress for wrongs they experience as a result of their parents' conduct.¹⁶⁶

The third justification asserts that a child's suit against a parent will deplete the family's financial resources.¹⁶⁷ This argument ignores the reality of the "widespread prevalence of liability insurance."¹⁶⁸ When insurance exists, parents do not pay damages out of the family's resources. While the potential for a judgment greater than the insurance policy exists, in these cases it is unlikely that the deficiency will be pursued by the child.¹⁶⁹ Furthermore, intrafamily suits about property, contract, and tort claims all threaten family finances but the immunity only operates as a bar to tort claims.¹⁷⁰

The possibility of parent and child conspiring to defraud the insurance carrier is the fourth justification for parent-child immunity.¹⁷¹ The danger of fraud and collusion in a suit between a parent and child is not unusual; indeed this possibility exists in virtually every liability insurance case.¹⁷² Yet precedent demonstrates that judges and juries are competent to distinguish the meritorious claim from the fraudulent claim.¹⁷³ In addition to jury trials, other methods of hin-

166. See *id.* ("The danger that insubordination will arise from possible knowledge of a right to complain of willful wrong has been magnified out of all proportion to the facts of life.").

167. See *supra* notes 102-104 and accompanying text (discussing the "protection of family resources" justification).

168. *Gibson*, 479 P.2d at 653.

169. Cf. *id.* ("[I]n truth, virtually no such suits [between parent and child] are brought except where there is insurance." (internal quotation marks omitted) (quoting Fleming James, Jr., *Accident Liability Reconsidered: The Impact of Liability Insurance*, 57 YALE L.J. 549, 553 (1948))).

170. See *supra* notes 156-157 and accompanying text (discussing this contradiction in the framework of the "family harmony" justification for the parent-child immunity doctrine).

171. See *supra* notes 96-101 and accompanying text (discussing the "collusion and fraud" justification).

172. See *Rousey v. Rousey*, 528 A.2d 416, 420 (D.C. 1987) (en banc) (noting that the possibility of collusion and fraud did not prevent the abrogation of the interspousal immunity doctrine in the District of Columbia). The possibility of fraud even exists in an action between a parent and adult child, however, the argument in support of parent-child immunity based on the possibility of fraud "fails to explain how the possibility of fraud would be magically removed merely by the child's attainment of legal majority." *Gelbman v. Gelbman*, 245 N.E.2d 192, 194 (N.Y. 1969).

173. See *Sorensen v. Sorensen*, 339 N.E.2d 907 (Mass. 1975) ("We constantly depend on efficient investigations and on juries and trial judges to sift evidence in order to determine the facts and arrive at proper verdicts."); *Nocktonick v. Nocktonick*, 611 P.2d 135, 142 (Kan. 1980) ("[I]t is unreasonable to eliminate causes of action of an entire class of persons simply because some undefined portion of the designated class may file fraudulent lawsuits [C]ourts must depend upon the efficiency of the judicial processes to ferret out the meritorious from the fraudulent in particular cases."); *Gelbman*, 245 N.E.2d at 194 ("[W]e rely upon the ability of the jury to distinguish between valid and fraudulent claims.").

dering the success of fraudulent claims include "[t]he deterrent effect of a perjury charge, extensive and detailed pretrial discovery procedures, the opportunity for cross-examination, and the availability of summary judgment motions."¹⁷⁴

The presence of insurance also figures prominently in the court's consistent deferral to the legislature on the issue of creating an exception to parent-child immunity for motor tort injuries. The Court of Appeals explains that the courts are not competent to balance the reasons for a motor tort exception against the social policies for the General Assembly's compulsory automobile liability insurance scheme.¹⁷⁵ However, the court is exactly the forum where two sides present opposing positions and have their dispute decided by an impartial observer. The court expressed its reluctance to "carfuffle the legislature's insurance scheme."¹⁷⁶ While admirable, this concern ignores the fact that the General Assembly can pass legislation when unhappy with a court's decision.¹⁷⁷

The immunity justifications are based on abstract principles from which courts have drawn a priori consequences.¹⁷⁸ While permitting suits between parent and child might a priori result in unstable families, out of control children, fraudulent and collusive suits, financial ruin for families, and tortfeasors profiting from their crimes; those states that have eliminated or never adopted parent-child immunity have not experienced the dire consequences presumed to result from intra-family suits.¹⁷⁹

Because the justifications advanced in support of the parent-child immunity doctrine are not sufficient to sustain the doctrine, the court in *Eagan* should have abrogated the doctrine. However, given the court's consistent adherence to the doctrine of parent-child immunity it seems unlikely that it would recognize these deficiencies and the need for abrogation. Therefore, in the alternative, the court should

174. *Kirchner v. Crystal*, 474 N.E.2d 275, 278 (Ohio 1984).

175. *See Frye v. Frye*, 305 Md. 542, 565-67, 505 A.2d 826, 838-39 (1986).

176. *Id.* at 567, 505 A.2d at 839.

177. For example, in *United States v. Streidel*, 329 Md. 533, 620 A.2d 905 (1993), the court ruled that Maryland's statutory cap on noneconomic damages did not apply to wrongful death actions. *Id.* at 537, 620 A.2d at 907. After this decision, the General Assembly amended the statute to expressly apply to wrongful death actions. Act of May 26, 1994, ch. 477, 1994 Md. Laws 2292 (codified as amended at MD. CODE ANN., CTS. & JUD. PROC. § 11-108(d)(2)(ii) (1995)).

178. *See Shearer v. Shearer*, 480 N.E.2d 388, 391 (Ohio 1985) (stating that in the cases creating parent-child immunity, "the doctrine was stated as a maxim, and the reasons advanced were an *a priori* analysis").

179. *See id.*; *see also Falco v. Pados*, 282 A.2d 351, 355 (Pa. 1971) (arguing that the consequences of permitting suits between parent and child are merely "speculative").

create a general exception to the immunity for claimants in wrongful death actions.

b. Application of Parental Immunity to Wrongful Death Actions.— Throughout the nation's courts, a general rule does not exist as to the applicability of parent-child immunity in wrongful death actions.¹⁸⁰ An examination of the purpose and language of Maryland's Wrongful Death Act and the nature of a wrongful death action indicates that parent-child immunity should not preclude a wrongful death suit by children against their parents, regardless of whether it is based on negligent or intentional conduct.

When interpreting the Wrongful Death Act, the Court of Appeals has stated that because the statute is "in derogation of the common law, [it] must be construed strictly."¹⁸¹ This is a harsh rule considering that the United States Supreme Court has noted that "[d]eath statutes have their roots in dissatisfaction with the archaisms of the law It would be a misfortune if a narrow or grudging process of construction were to exemplify and perpetuate the very evils to be remedied."¹⁸² Since the legislature adopted the Wrongful Death Act to remedy an intolerable situation at common law,¹⁸³ the court's interpretation of the statute should not frustrate this purpose.¹⁸⁴ Permitting a defendant to raise parent-child immunity as a defense against the beneficiary foils the good intentions of the legislature to provide the beneficiaries of the deceased with a cause of action.

A review of the language of Maryland's Wrongful Death Act further supports the proposition that parent-child immunity should not apply to the beneficiaries in a wrongful death action. Allowing parent-child immunity to bar a beneficiary's wrongful death action because of his relationship to the tortfeasor leads to a bizarre result. The Act categorizes a "child of the deceased" as a primary benefi-

180. See Annotation, *Action Against Parent By or on Behalf of Unemancipated Minor Child for Wrongful Death of Other Parent*, 87 A.L.R.3d 849, 852-54 (1978) (discussing the ways in which courts apply parent-child immunity to wrongful death actions).

181. *State ex rel. Dunnigan v. Cobourn*, 171 Md. 23, 25, 187 A. 881, 882 (1936) (citing *Allen v. Seff*, 160 Md. 240, 153 A. 54 (1931); *Demczuk v. Jenifer*, 138 Md. 488, 114 A. 471 (1921); 2 J.G. SUTHERLAND & JOHN LEWIS, *STATUTES AND STATUTORY CONSTRUCTION* § 632, at 1142 (2d ed. 1904)).

182. *Van Beeck v. Sabine Towing Co., Inc.*, 300 U.S. 342, 350-51 (1937).

183. At common law, a tortfeasor who caused the death of another escaped civil liability because the action died with the victim. See *Stewart v. United Elec. Light & Power Co.*, 104 Md. 332, 333, 65 A. 49, 50 (1906).

184. *Cf. Barrett v. Charlson*, 18 Md. App. 80, 91-93, 305 A.2d 166, 173-74 (1973) (interpreting an amendment to the Wrongful Death Act based on the intentions of the legislature, in addition to a literal reading).

ary.¹⁸⁵ Minor and adult children are not distinguished for the purposes of pecuniary damage awards.¹⁸⁶ An adult child can recover pecuniary damages from a parent because neither the Wrongful Death Act nor the doctrine of parent-child immunity prevents recovery. However, under the rule adopted in *Eagan*, parent-child immunity may prevent a child from recovering damages in a wrongful death suit against a parent.¹⁸⁷ This outcome seems contrary to common sense because a minor child probably has less of an ability to support herself than an adult child and therefore the minor child ought to be able to recover for the economic losses occasioned by her parent's death.

The indirect nature of a wrongful death action implies that parent-child immunity should not apply to wrongful death beneficiaries because the immunity precludes suits between parent and children for *direct* injuries.¹⁸⁸ A wrongful death suit is a suit to recover for the beneficiaries' indirect injuries resulting from the defendant's actions resulting in direct bodily injury to the decedent.¹⁸⁹ The beneficiary in a wrongful death action does not seek recovery for direct injuries inflicted by the defendant on the beneficiary. The Court of Appeals recognized the indirect-direct distinction when it stated that damages recovered for wrongful death do not belong to the "direct victim" and are not measured in terms of the "direct victim[']s" injury.¹⁹⁰

While the wrongful death action is an action for indirect injuries, the parent-child immunity doctrine was established in cases of direct injuries. The great trilogy of cases from which the doctrine developed all involved the application of the immunity in cases of direct injuries:

185. MD. CODE ANN., CTS. & JUD. PROC. § 3-904(a) (Supp. 1998).

186. *See id.* § 3-904(c).

187. *Eagan*, 347 Md. at 82, 698 A.2d at 1102.

188. *See infra* note 189.

189. The Wrongful Death Act compensates for the pecuniary value of the life lost as well as "mental anguish, emotional pain and suffering, loss of society, companionship, comfort, protection, marital care, parental care, filial care, attention, advice, counsel, training, guidance, or education." CTS. & JUD. PROC. § 3-904(d). Compensation under the Act is not based upon the decedent's pain and suffering that occurs as a direct result of the tortfeasor's actions. *See Minkin v. Minkin*, 7 A.2d 461, 463 (Pa. 1939) (holding that despite the doctrine of parent-child immunity, a minor can bring an action against a surviving parent for the wrongful death of the other parent); *Recent Case*, 44 DICK. L. REV. 143, 143-44 (1940) (stating that the court in *Minkin* permitted recovery because "the injury [was] an indirect tort," and the common law rule precluding a child from suing his parent applied only when a "personal tort" was involved).

190. *United States v. Streidel*, 329 Md. 533, 540, 620 A.2d 905, 909 (1993) ("[R]ecover for 'death' under the wrongful death act does not compensate for the 'personal injury' to the direct victim of the tortious conduct.").

mother commits daughter to insane asylum;¹⁹¹ parents corporeally punish daughter;¹⁹² father rapes daughter.¹⁹³ Each of these three cases involved "personal injuries suffered at the hands of the parent."¹⁹⁴ Similarly, when the Court of Appeals adopted the immunity in *Schneider v. Schneider*, the mother's personal injuries were received directly as a result of her son's negligent driving.¹⁹⁵ Since the Wrongful Death Act applies to indirect injuries and the parent-child immunity applies to direct injuries, the immunity should not prevent wrongful death claims.

Unfortunately, the *Eagan* court ignored this indirect theory and instead emphasized form over substance by focusing on the personal nature of a wrongful death action.¹⁹⁶ Substantively, a wrongful death action between parent and child is more similar to a suit for injury to property than a tort against a person.¹⁹⁷ The property the child loses is the pecuniary support from the parent she could have expected had the parent lived.¹⁹⁸ Despite the threat to family harmony,¹⁹⁹ parental immunity has not barred property related causes of action between parent and child.²⁰⁰ Because, in substance, the nature of a wrongful death action is that of a suit for injury to property, parent-child immunity should not extend to claimants under the Wrongful Death Act.

c. Recognizing a Mahnke Exception as a Matter of Law.—In *Eagan*, the court departed, albeit slightly, from its previous interpretations of the doctrine of parent-child immunity and the *Mahnke* excep-

191. See *supra* notes 42-50 and accompanying text (discussing *Hewlett v. George*).

192. See *supra* notes 51-56 and accompanying text (discussing *McKelvey v. McKelvey*).

193. See *supra* notes 57-63 and accompanying text (discussing *Roller v. Roller*).

194. *Hewlett v. George*, 9 So. 885, 887 (Miss. 1891).

195. *Schneider v. Schneider*, 160 Md. 18, 20, 152 A.2d 498, 499 (1930).

196. *Eagan*, 347 Md. at 82, 698 A.2d at 1102 (framing the question as to the applicability of parent-child immunity in general to a wrongful death action in terms of the nonderivative character of the action).

197. See *Minkin v. Minkin*, 7 A.2d 461, 465 (1939) (Stern, J., concurring) ("An action for damages resulting from a parent's death is to recover for a *property* loss—the deprivation of support that would have been received from the deceased parent had he lived."). Recovery for wrongful death is not intended to punish the tortfeasor. See *Cohen v. Rubin*, 55 Md. App. 83, 101-02, 460 A.2d 1046, 1056 (1983) (holding that punitive damages cannot be recovered under the Wrongful Death Act).

198. *Minkin*, 7 A.2d at 465. See generally *Frye v. Frye*, 305 Md. 542, 560-61, 505 A.2d 826, 835-36 (1986) (discussing the statutory duty of parents to support and care for their children).

199. *McCurdy*, *supra* note 35, at 1075 ("It is common knowledge that some of the most acrimonious family disputes have arisen in respect to property.").

200. *KEETON ET AL.*, *supra* note 107, § 122, at 904 ("In matters affecting property, causes of action seem always to have been freely recognized on the part of either the parent or the child." (footnotes & citations omitted)).

tion. In its refusal to apply the *Mahnke* exception to all wrongful death actions, the court reasoned that it is not the outcome of the defendant's conduct that matters, but rather whether the conduct rises beyond negligence to an intentional act.²⁰¹ According to the court, negligent killings may test the strength of the family but they do not destroy the family.²⁰² This position is consistent with previous decisions applying parent-child immunity when the defendant's negligence resulted in death.²⁰³

While refusing to recognize an exception to the immunity for all wrongful death actions, the court did recognize an exception for a specific category of wrongful death actions. The court held a wrongful death action arising from the murder or voluntary manslaughter of a spouse or child automatically fits within the *Mahnke* exception for cruel and inhuman treatment.²⁰⁴ At first glance this holding seems to be consistent with *Mahnke* because both *Mahnke* and *Eagan* involved the murder of one parent by the other.²⁰⁵ However, *Eagan* lacks an element that is present in *Mahnke* and stressed by later decisions as well. The *Mahnke* court described the father's murder of his child's mother and his suicide, both in the presence of the child, as a "tort against an eyewitness."²⁰⁶ Subsequent discussions of *Mahnke* that refused to apply parent-child immunity also pointed out that the crimes in *Mahnke* were committed in front of the child.²⁰⁷ The *Eagan* children did not witness the death of their mother. In this sense, *Eagan* expands upon the *Mahnke* exception by applying it to deaths not witnessed by the children, contrary to the court's stated intention to narrowly interpret *Mahnke*.²⁰⁸

201. *Eagan*, 347 Md. at 83, 698 A.2d at 1103.

202. *Id.*

203. See, e.g., *Smith v. Gross*, 319 Md. 138, 148-49, 571 A.2d 1219, 1224 (1990) (granting a father immunity from a wrongful death suit by his wife for his negligent operation of an automobile resulting in the death of his child); *Latz v. Latz*, 10 Md. App. 720, 732-33, 272 A.2d 435, 442 (1971) (barring a father's action for damages for the death of his wife caused by the daughter's negligence).

204. *Eagan*, 347 Md. at 85, 698 A.2d at 1104.

205. See *id.* at 77, 698 A.2d at 1100; *Mahnke v. Moore*, 197 Md. 61, 63, 77 A.2d 923, 924 (1951).

206. *Mahnke*, 197 Md. at 69, 77 A.2d at 927.

207. See *Shell Oil Co. v. Ryckman*, 43 Md. App. 1, 4, 403 A.2d 379, 381 (1979) (describing the violent facts in *Mahnke* in order to demonstrate what constitutes the complete abandonment of the parental relationship and noting that the murder took place in the presence of the child); *Montz v. Mendaloff*, 40 Md. App. 220, 225, 388 A.2d 568, 571 (1978) (same).

208. *Ryckman*, 43 Md. App. at 4, 403 A.2d at 381 ("*Mahnke* does not represent an expandable exception to the parent-child immunity doctrine, but instead should be narrowly construed." (citing *Montz*, 40 Md. App. at 224-25, 388 A.2d at 571)).

A comparison of the injuries in *Eagan* and *Mahnke* further illustrates this difference. The *Eagan* children's injuries stemmed from their loss of the economic support of their mother and the injury to their feelings occasioned by the death of their mother.²⁰⁹ While the child in *Mahnke* undoubtedly suffered similar injuries, her complaint alleged injuries specifically connected to her horrific experience, which was comparable to the tort of intentional infliction of emotional distress.²¹⁰

Although the *Eagan* court appeared to expand upon the *Mahnke* exception, the reformulation of *Mahnke* in criminal terms also affirmed previous decisions refusing to abrogate parent-child immunity in cases of negligence and motor torts. In its clarification of the *Mahnke* exception, the *Eagan* court did not include involuntary manslaughter within the types of killings constituting cruel and inhuman treatment.²¹¹ Involuntary manslaughter is "the killing of another unintentionally and without malice (1) in doing some unlawful act not amounting to a felony, or (2) in negligently doing some act lawful in itself, or (3) by the negligent omission to perform a legal duty."²¹² Courts in other jurisdictions have upheld the application of parent-child immunity in cases involving involuntary manslaughter.²¹³ The *Eagan* court also excluded manslaughter by automobile from its list of acts constituting cruel and inhuman treatment.²¹⁴ Maryland courts have consistently declined to create an exception to parent-child immunity for motor vehicle torts.²¹⁵ By holding that only murder and

209. *Eagan*, 347 Md. at 79, 698 A.2d at 1101.

210. *Mahnke*, 197 Md. at 63, 77 A.2d at 923.

211. *Eagan*, 347 Md. at 83, 698 A.2d at 1103.

212. *Rolfes v. State*, 10 Md. App. 204, 207, 268 A.2d 795, 796 (1970) (quoting *State v. Gibson*, 4 Md. App. 236, 242, 242 A.2d 575, 578 (1968), *aff'd*, 254 Md. 399, 254 A.2d 691 (1969)).

213. *See Perkins v. Robertson*, 295 P.2d 972 (Cal. Dist. Ct. App. 1956) ("We conclude that the rule that unemancipated minors cannot sue a parent . . . also applies to wrongful death actions based on negligence." (citing *Strong v. Strong*, 267 P.2d 240 (Nev. 1954), *overruled by* *Rupert v. Stienne*, 528 P.2d 1013, 1017 (Nev. 1974) ("Strong erroneously held that Nevada's wrongful death statute did not repeat the common law rule of immunity of the parent from suit by a minor child. There is no common law rule of parental immunity." (citation omitted)))).

214. *Eagan*, 347 Md. at 83, 698 A.2d at 1103. Manslaughter by automobile is a misdemeanor for "causing the death of another as the result of the driving, operation or control of an automobile . . . or other vehicle in a grossly negligent manner." MD. ANN. CODE art. 23, § 388 (Supp. 1998).

215. *See, e.g., Warren v. Warren*, 336 Md. 618, 627, 650 A.2d 252, 256 (1994); *Frye v. Frye*, 305 Md. 542, 566, 505 A.2d 826, 838 (1986); *Waltzinger v. Birsner*, 212 Md. 107, 125-26, 128 A.2d 617, 626-27 (1957); *Montz v. Mendaloff*, 40 Md. App. 220, 224, 388 A.2d 568, 570 (1978); *Latz v. Latz*, 10 Md. App. 720, 725, 272 A.2d 435, 438 (1971).

voluntary manslaughter fall within the *Mahnke* exception as a matter of law, the Court of Appeals adhered to its precedent.

While not disputing the cruelty and inhumaneness of murder and voluntary manslaughter, it is interesting to note that the court did not raise the "malicious and wanton wrongs" exception established in *Mahnke*. A possible reason for the court's omission is that by definition, murder, but not manslaughter, rises to the level of a malicious and wanton wrong.²¹⁶ A second reason may be that the malicious and wanton wrong exception only exists when the parent directly injures the child either physically or by forcing the child to witness the perpetration of the acts, as in *Mahnke*. Finally, the omission of the exception may have been an innocent oversight.

Thus, the *Eagan* court added greater clarification to the *Mahnke* exception for cruel and inhuman treatment. Anytime a child sues for the wrongful death of a parent, parent-child immunity does not apply as a matter of law if the claim is based upon the murder or voluntary manslaughter of one parent by the other.²¹⁷

5. *Conclusion.*—In *Eagan v. Calhoun*, the Court of Appeals assists future cases by clarifying that the *Mahnke* exception to parent-child immunity applies as a matter of law to wrongful death actions brought for murder or voluntary manslaughter. Unfortunately, the decision affirms the status quo in Maryland by refusing to recognize the failure of the policies underlying parent-child immunity, thereby assuring an uphill battle for children who seek civil redress for wrongs inflicted upon them by their parents.

AIMÉE M. ACETO

B. Silent Application of a Limited Attractive Nuisance Doctrine in the State of Maryland

In *Baltimore Gas & Electric Co. v. Flippo*,²¹⁸ the Court of Appeals considered whether the defendant, Baltimore Gas and Electric Company (BGE), could be held liable for injuries sustained by a nine-year-old boy who unintentionally made contact with overhead electrical wires owned by BGE that ran through a tree he was climbing.²¹⁹ The

216. See *Lindsay v. State*, 8 Md. App. 100, 104 n.4, 258 A.2d 760, 763 n.4 (1969) ("The essential distinction between murder and manslaughter . . . is the presence or absence of malice." (omission in original) (citing *Chisley v. State*, 202 Md. 87, 95 A.2d 577 (1953))).

217. *Eagan*, 347 Md. at 85, 698 A.2d at 1104.

218. 348 Md. 680, 705 A.2d 1144 (1998).

219. See *id.* at 688, 705 A.2d at 1148.

Court of Appeals held that the traditional Maryland trespasser liability rule²²⁰ did not apply to the circumstances of this case,²²¹ because Flippo had the status of a licensee by invitation as to the tree at the time he made contact with BGE's wire.²²² The court used an ordinary negligence standard instead of looking to traditional landowner liability rules.²²³ The court overruled *Baltimore Gas & Electric Co. v. Lane*,²²⁴ *Murphy v. Baltimore Gas & Electric Co.*,²²⁵ *Mondshour v. Moore*,²²⁶ *Grube v. Mayor of Baltimore*,²²⁷ and *State ex rel. Stansfield v. Chesapeake & Pottomac Telephone Co.*²²⁸ to the extent those cases could be read as holding that the defendants owed no duty of care to plaintiffs who were not trespassers on the real property but who injured themselves by coming into contact with the defendants' personal property located thereon.²²⁹ In so doing, the Court of Appeals has silently adopted a limited attractive nuisance doctrine applicable to children who have a right to be on the real property but injure themselves as a result of trespass to personal property of another located on the premises.

1. *The Case.*—On October 1, 1992, J.J. Flippo (Flippo), a nine-year-old boy, and his sister were playing with other children in Richard and Christine Gaineses' backyard.²³⁰ Two of the children, Flippo and Robbie Gaines, decided to climb a white pine tree located near the rear property line.²³¹ There was evidence that Flippo and Gaines

220. *Id.* at 689, 705 A.2d at 1148 (noting that in Maryland the only duty owed to trespassers on real property, even those of "tender years," is to "not willfully or wantonly injure or entrap the trespasser" (citing *Murphy v. Baltimore Gas & Elec. Co.*, 290 Md. 186, 190, 428 A.2d 459, 462-63 (1981))).

221. *Id.* at 694, 705 A.2d at 1151.

222. *Id.* at 695, 705 A.2d at 1151.

223. *Id.* at 699, 705 A.2d at 1153.

224. 338 Md. 34, 656 A.2d 307 (1995), *holding limited by Flippo*, 348 Md. at 695, 705 A.2d at 1151.

225. 290 Md. 186, 428 A.2d 459 (1981), *holding limited by Flippo*, 348 Md. at 695, 705 A.2d at 1151.

226. 256 Md. 617, 261 A.2d 482 (1970), *holding limited by Flippo*, 348 Md. at 695, 705 A.2d at 1151.

227. 132 Md. 355, 103 A. 948 (1918), *holding limited by Flippo*, 348 Md. at 695, 705 A.2d at 1151.

228. 123 Md. 120, 91 A. 149 (1914), *holding limited by Flippo*, 348 Md. at 695, 705 A.2d at 1151.

229. *Flippo*, 348 Md. at 695, 705 A.2d at 1151; *see also id.* at 696, 705 A.2d at 1152 (distinguishing *Lane*, *Murphy*, *Mondshour*, *Grube*, and *Stansfield* on the ground that the plaintiffs in those cases "intentionally trespassed on real property or made contact with the property of the defendant in a manner that may have constituted contributory negligence or assumption of risk as a matter of law").

230. *Id.* at 687, 705 A.2d at 1147.

231. *Id.*

had permission to climb the tree.²³² Since 1967, BGE has had an easement giving it a right-of-way over the rear boundaries of the Gaines property where the tree is located,²³³ and, consequently, there were two high voltage electric wires running through the upper branches of the tree.²³⁴ Flippo had climbed more than halfway up the tree when his foot slipped and he began to fall.²³⁵ As he fell, he reached out with his hand and made contact with one of the electrical wires.²³⁶ As a result, Flippo sustained severe burns²³⁷ to his hands and left foot.²³⁸

In 1993, Flippo's mother filed a negligence suit against BGE in the Circuit Court for Prince George's County seeking damages for her son's injuries.²³⁹ The suit alleged that BGE was negligent in its failure to trim the tree that Flippo had been climbing when he came into contact with the electrical wire.²⁴⁰ At trial, the jury returned a verdict for Flippo and awarded \$487,516 in compensatory damages.²⁴¹ However, because there was insufficient evidence to support some of the money awarded for Flippo's future medical expenses, the trial court reduced the award to \$483,162.²⁴² BGE appealed the decision to the Court of Special Appeals, asserting that the trial court had committed ten reversible errors.²⁴³ The Court of Special Appeals upheld the circuit court decision in favor of Flippo.²⁴⁴ The court held that because the Plaintiff's contact with the electrical wire was "not an intentional or volitional act," he was not a trespasser on BGE's personal property.²⁴⁵ Therefore, BGE was not entitled to jury instructions relating

232. *Id.*

233. *Id.* at 687 n.2, 705 A.2d at 1147 n.2.

234. *Id.* at 687, 705 A.2d at 1147. BGE knew that the tree in the Gaineses' yard was one that the children might be likely to climb. *See id.* at 702, 705 A.2d at 1155 (finding "that the white pine tree Flippo was climbing was easy to climb and that BGE was aware of the existence of such climbable trees"); *Baltimore Gas & Elec. Co. v. Flippo*, 112 Md. App. 75, 89, 684 A.2d 456, 463 (1996) (stating that evidence at trial showed that the tree had "low, ladder-like branches, particularly those that children are likely to come in contact with in residential neighborhoods" and that BGE had classified the tree as "climbable"), *aff'd*, 348 Md. 680, 705 A.2d 1144 (1998).

235. *Flippo*, 348 Md. at 687, 705 A.2d at 1147.

236. *Id.*

237. *Id.*; *Flippo*, 112 Md. App. at 81, 684 A.2d at 459.

238. *See* Brief and Appendix of Appellant at 5-6, *Baltimore Gas & Elec. Co. v. Flippo*, 348 Md. 680, 705 A.2d 1144 (1998) (No. 4).

239. *See Flippo*, 348 Md. at 686, 705 A.2d at 1147.

240. *Id.* at 687, 705 A.2d at 1147.

241. *Id.*

242. *Id.*

243. *See Flippo*, 112 Md. App. at 80-81, 684 A.2d at 458.

244. *Id.* at 81, 684 A.2d at 458-59.

245. *Id.* at 85-87, 684 A.2d at 461 (stating that while "no tortious intent . . . is required in order for one to be a trespasser," volition, i.e., "a conscious intent to do the act that consti-

to the amount of care owed by a landowner to a trespasser.²⁴⁶ The court also determined that because of the foreseeability of harm to young children who might be lured by the low-lying branches to climb the tree and come into contact with the electrical wires, “a jury could reasonably conclude that the duty of BGE to exercise a high degree of attention and care²⁴⁷ included the duty to ‘trim, top, or cut down’” the tree.²⁴⁸ The court also stated that the trial court provided adequate jury instructions concerning contributory negligence.²⁴⁹ Furthermore, the court held that because BGE suffered no prejudice from the omission of jury instructions concerning assumption of risk, it did not constitute reversible error.²⁵⁰

BGE appealed the Court of Special Appeals’s decision. The Court of Appeals granted certiorari to consider: (1) whether Flippo’s unintentional contact with the wire during the fall constituted a trespass on BGE’s personal property as a matter of law; (2) whether BGE had a duty to identify and trim “climbable” trees located near its electrical wires that are located in residential areas; (3) whether Flippo’s knowledge of both the dangers of electricity and the presence of overhead wires prior to climbing the tree constituted contributory negligence as a matter of law; and (4) whether the court erred in refusing

tutes the entry upon someone else’s real or personal property,” is required and that therefore “[a]n involuntary entry onto another’s property is not a trespass”).

246. *Id.* at 87, 684 A.2d at 462. BGE had requested that the jury be instructed that a trespass will exist even if the contact with the personal property was accidental or inadvertent. Furthermore, BGE wanted the jury to be instructed that this rule applied to personal property regardless of the plaintiff’s status in relation to the real property and regardless of the plaintiff’s age. *Id.*, 684 A.2d at 461-62.

247. *See id.* at 88, 684 A.2d at 462 (“The primary rule relative to the diligence required of electric companies, running through all of the decisions, is that they must observe such care as is commensurate with the danger involved.” (internal quotation marks omitted) (quoting *Eastern Shore Pub. Serv. Co. v. Corbett*, 227 Md. 411, 425, 177 A.2d 701, 709 (1962))).

248. *Id.* at 90-91, 684 A.2d at 463 (reasoning that BGE’s classification of the tree Flippo climbed when he injured himself as climbable demonstrated that BGE had at least “implied cognizance of reasonably foreseeable harm” to children in the area).

249. *Id.* at 92-93, 684 A.2d at 464 (concluding the jury instruction on contributory negligence was “both accurate and adequate” because “[i]t informed the jury that the plaintiff cannot recover if his own negligence is a cause of his injury—not the sole cause, not a major cause—but a cause”).

250. *Id.* at 96-97, 684 A.2d at 466. While contributory negligence is based on an objective standard, the assumption of risk defense would have required the heavier burden of proof that Flippo actually knew that the electrical wires were located overhead running through the tree and that he actually appreciated the danger of those wires before he decided to climb the tree. Since the trial court had submitted the issue of contributory negligence to the jury, and the jury returned a verdict in favor of Flippo, the Court of Special Appeals found no reversible error. *Id.*

to give jury instructions on assumption of risk, even though it instructed the jury on contributory negligence.²⁵¹

2. *Legal Background.*—In *Baltimore Gas & Electric v. Flippo*, the Court of Appeals stated that it overruled five of its previous decisions relating to the duty owed to an individual who comes into contact with and is subsequently injured by the personal property of another to the extent that these opinions could be read as holding that no duty is owed to individuals who had a right to be on the real property where the personal property was located.²⁵² Examination of these five decisions demonstrates the evolution of Maryland's landowner liability rules, shifting from a strict application at the beginning of the century to an analysis closely approximating the attractive nuisance doctrine in *Flippo*.²⁵³

Prior to the Court of Appeals's decision in *Flippo*, Maryland stood as the only state that refused to recognize any form of an attractive nuisance doctrine.²⁵⁴ The Supreme Court first discussed the attrac-

251. *Flippo*, 348 Md. at 688, 705 A.2d at 1148.

252. *Id.* at 695, 705 A.2d at 1151.

253. Section 339 of the *Restatement (Second) of Torts* provides:

A possessor of land is subject to liability for physical harm to children trespassing thereon caused by an artificial condition upon the land if

(a) the place where the condition exists is one upon which the possessor knows or has reason to know that children are likely to trespass, and

(b) the condition is one of which the possessor knows or has reason to know and which he realizes or should realize will involve an unreasonable risk of death or serious bodily harm to such children, and

(c) the children because of their youth do not discover the condition or realize the risk involved in intermeddling with it or in coming within the area made dangerous by it, and

(d) the utility to the possessor of maintaining the condition and the burden of eliminating the danger are slight as compared with the risk to children involved, and

(e) the possessor fails to exercise reasonable care to eliminate the danger or otherwise to protect the children.

RESTATEMENT (SECOND) OF TORTS § 339 (1966). The rule set forth in section 339 is commonly referred to as the "attractive nuisance" doctrine. *Id.* cmt. b. The Court of Appeals has consistently refused to adopt the attractive nuisance doctrine. See *infra* notes 254-264 and accompanying text.

254. See 5 FOWLER V. HARPER ET AL., THE LAW OF TORTS § 27.5, at 166 n. 27 (2d ed. 1986) (commenting that while Vermont and Ohio have also not affirmatively recognized an attractive nuisance doctrine, these jurisdictions have come to recognize some form of a duty of care to trespassers whose presence is known or reasonably anticipated by the landowner); Holly L. Drumheller, Note, *Maryland's Rejection of Attractive Nuisance Doctrine*, 55 MD. L. REV. 807, 807 (1996) (discussing the Maryland Court of Appeals's refusal "to follow the national trend of accepting the attractive nuisance doctrine" in *Baltimore Gas & Electric Co. v. Lane*, 338 Md. 34, 656 A.2d 307 (1995)).

tive nuisance doctrine in the landmark case of *Railroad Co. v. Stout*.²⁵⁵ The Court began the opinion by stating that children should not be judged by the same standards as an adult.²⁵⁶ The case involved a young boy who injured himself while playing on one of the railroad's unlocked turntables.²⁵⁷ The Court stated that the railroad company knew or should have known that the turntable would be an appealing play item for the children.²⁵⁸ Furthermore, the Court concluded that the danger could have been eliminated without great expense to the railroad company by replacing the broken lock on the turntable.²⁵⁹ Thus, although the boy trespassed on both the real and personal property of the railroad company, the Court recognized that sufficient evidence existed of negligence on the part of the railroad company for a jury to find in favor of the child.²⁶⁰

The Maryland Court of Appeals first faced the attractive nuisance issue in *Mergenthaler v. Kirby*.²⁶¹ In that case, a twelve-year-old boy injured himself while stealing scrap metal from the defendant's factory.²⁶² The Court of Appeals distinguished its opinion from *Stout* by noting the illegal purpose of the child's trespass.²⁶³ Thus, the Court of Appeals determined that the child's status as a thief barred his recovery.²⁶⁴

In keeping with this early decision in *Mergenthaler*, Maryland has traditionally followed a landowner liability system of classification in analyzing the duty owed to individuals injured on or by the property of another.²⁶⁵ This analysis places individuals into four categories, each imposing a different legal duty of care: invitee, licensee by invitation, bare licensee, and trespasser.²⁶⁶ Because invitees remain on

255. 84 U.S. 657 (1873).

256. *Id.* at 660 (explaining that while an adult must be free from fault in order to recover in an action alleging negligence of another, "[t]he care and caution required of a child is according to his maturity and capacity only, and this is to be determined in each case by the circumstances of that case").

257. *Id.* at 658.

258. *Id.* at 662.

259. *Id.*

260. *Id.* at 663.

261. 79 Md. 182, 28 A. 1065 (1894).

262. *Id.* at 183, 28 A. at 1066.

263. *Id.* at 186, 28 A. at 1067.

264. *Id.* (explaining that where an individual is engaged in a criminal act against the defendant while trespassing on the defendant's property, he is afforded no protection from the defendant).

265. See *Baltimore Gas & Elec. Co. v. Lane*, 338 Md. 34, 44, 656 A.2d 307, 312 (1995) (citing *Wagner v. Doehring*, 315 Md. 97, 101-02, 553 A.2d 684 (1989)), holding limited by *Flippo*, 348 Md. at 695, 705 A.2d at 1151.

266. *Id.*

the premises for purposes related to the landowner's business, the landowner must exercise reasonable care towards his invitees in assuring the safety of the premises.²⁶⁷ A typical social guest is classified as a licensee by invitation, and as such he "takes the premises as his host uses them."²⁶⁸ A licensee by invitation is owed a duty of reasonable care, and the landowner must warn of known dangerous conditions on the premises that would not normally be discovered.²⁶⁹ While a licensee by invitation is a social guest, a bare licensee enters the premises with the consent of the landowner but "for his or her own convenience or purpose."²⁷⁰ Trespassers enter the property of others without their consent or without any privilege to do so.²⁷¹ A landowner owes no duty to bare licensees or trespassers "except to refrain from willfully or wantonly injuring or entrapping" them.²⁷² However, a landowner may not "create new and undisclosed sources of danger without warning the licensee," thus providing a slightly greater level of protection to the bare licensee over the mere trespasser.²⁷³

Because one may be injured either on the real or personal property of another, two points must be considered in determining the scope of the duty owed to an injured party. First, there is no distinction between the duty owed to someone injured by contact with real property from that which is owed to one injured by personal property.²⁷⁴ Second, a duty of care towards others arises from the posses-

267. See *Wagner*, 315 Md. at 102, 553 A.2d at 686 ("A landowner must use reasonable and ordinary care to keep the premises safe for an invitee, defined as one permitted to remain on the premises for purposes related to the owner's business." (citing *Bramble v. Thompson*, 264 Md. 518, 521, 287 A.2d 265, 267 (1972))); *Bramble*, 264 Md. at 521, 287 A.2d at 267 ("The owner must use reasonable and ordinary care to keep his premises safe for the invitee and to protect the invitee from injury caused by an unreasonable risk which the invitee, by exercising ordinary care for his own safety, will not discover." (citing *Morrison v. Suburban Trust Co.*, 213 Md. 64, 68-69, 130 A.2d 915, 917 (1957); *Perego v. Western Md. R.R. Co.*, 202 Md. 203, 207, 95 A.2d 867, 869 (1953))).

268. *Bramble*, 264 Md. at 521, 287 A.2d at 267.

269. See *Wagner*, 315 Md. at 102, 553 A.2d at 686; *Bramble*, 264 Md. at 521-22, 287 A.2d at 267.

270. *Wagner*, 315 Md. at 102, 553 A.2d at 686-87.

271. *Id.*, 553 A.2d at 687.

272. *Id.* (noting that "the rule limiting liability to trespassers permits 'a person to use his own land in his own way, without the burden of watching for and protecting those who come there without permission or right'" (quoting *W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS* § 58, at 395 (5th ed. 1984))).

273. *Id.* (internal quotation marks omitted) (quoting *Sherman v. Suburban Trust Co.*, 282 Md. 238, 242, 384 A.2d 76, 79 (1978)).

274. See *Baltimore Gas & Elec. Co. v. Lane*, 338 Md. 34, 44-45, 656 A.2d 307, 312 (1995) (explaining that "landowner" or "premises" liability often overlooks the fact that "[t]he same principles apply to personal property as to real property" (citing *Murphy v. Baltimore Gas & Elec. Co.*, 290 Md. 186, 191 n.3, 428 A.2d 459, 463 n.3 (1981); *RESTATEMENT (SEC.*

sion of the real or personal property at issue, rather than from ownership.²⁷⁵

In *State ex rel. Stansfield v. Chesapeake & Potomac Telephone Co.*,²⁷⁶ the Court of Appeals held that the defendant utility company was not liable for the death of an adult individual who climbed a telephone pole to retrieve a lost kitten and came into contact with “insufficiently insulated wires.”²⁷⁷ Because it was located in front of an individual’s home, he had a right to be on the property surrounding the pole but not on the actual pole itself.²⁷⁸ The court held that because of the inherent dangers of the utility pole, the telephone company intended ascent of the pole to be limited to its employees;²⁷⁹ permission to climb the pole did not extend by implied invitation to those living in the immediate vicinity of the pole.²⁸⁰ Therefore, the court held that the plaintiff’s decedent was, if not a trespasser, at best a mere licensee with regard to the utility pole “to whom the defendant would owe only the duty to avoid exposing [him] willfully to the risk of injury.”²⁸¹ Thus, the defendant was held not liable.²⁸² The court noted that recovery would not be barred in instances where an individual enjoys a more protected status than trespasser or mere licensee and is injured by something that the utility company would consider a reasonably foreseeable danger.²⁸³

OND) OF TORTS § 217 cmt. a (1966))), *holding limited by Flippo*, 348 Md. at 695, 705 A.2d at 1511.

275. *See id.* at 45, 656 A.2d at 312 (stating “it is the possession of property, not the ownership, from which the duty flows”).

276. 123 Md. 120, 91 A. 149 (1914), *holding limited by Flippo*, 348 Md. at 695, 705 A.2d at 1151.

277. *Id.* at 123, 91 A. at 150. The utility pole had spikes projecting from it for use in maintaining the pole which may have facilitated climbing by unauthorized individuals. *Id.* at 122-23, 81 A. at 149-50.

278. *Id.* at 122, 91 A. at 149.

279. *Id.* at 125, 91 A. at 150.

280. *Id.* The plaintiff argued that the spikes projecting from the pole:

operated as an invitation to the public, and more particularly to the owners and occupiers of the abutting properties, to ascend the pole by means of the spikes, whenever they might have occasion to do so for any proper purpose, and especially for the preservation of the life of animals or human beings, or for the recovery of personal property.

Id. at 122, 91 A. at 149.

281. *Id.* at 124, 91 A. at 150.

282. *Id.* at 127, 91 A. at 151.

283. *See id.* (noting that liability would attach in situations where “the persons involved in the accidents were not trespassers or mere licensees on the defendant’s property, but were in adjacent positions where they could rightfully be, and where they might be reasonably expected to come in close proximity to the source of danger”); *see supra* notes 265-273 and accompanying text (describing the varying duties owed by a property owner to persons on his property).

Following *Stansfield*, the court next considered the duty owed to a child injured because he trespassed on the personal property of a utility company. In *Grube v. Mayor of Baltimore*,²⁸⁴ the Court of Appeals considered the liability of city officials and the electric company for injuries sustained by a ten-year-old boy who climbed an electric pole located in a school yard.²⁸⁵ The boy climbed the electric pole to watch a summer baseball game and slipped, grabbing an electrical wire as he fell.²⁸⁶ The accident caused severe burns on the boy's hand and a fractured skull from the subsequent fall.²⁸⁷ School officials had taken precautions to remove low-lying maintenance access spikes on the pole in order to deter children playing after school hours from climbing on it.²⁸⁸ The *Grube* court interpreted *Stansfield* as "conclusively establish[ing]" that the defendant utility company could not be held liable, noting that the only exception to this would be if the court recognized the attractive nuisance doctrine based on the plaintiff's young age.²⁸⁹ The court, however, declined to apply the doctrine in this case, when the boy knew or should have known that he did not have permission to climb the pole.²⁹⁰ While the boy had a right to be in the school yard, the act of climbing the pole made him a trespasser with respect to the electric company's personal property.²⁹¹ In affirming the lower court's judgment in favor of the defendants by rejecting the attractive nuisance doctrine, the court stated:

Children should receive all reasonable protection from the courts, but however much such an injury as this boy sustained is to be regretted, it does not justify mulcting innocent people or corporations in damages for injuries sustained by a boy over [ten] years of age who had no right to do what he did do, and who did it in a way that shows he knew he had no right to do it.²⁹²

By refusing to treat the boy any differently than the adult in *Stansfield*, the *Grube* court established Maryland's rule of rejecting the applica-

284. 132 Md. 355, 103 A. 948 (1918), *holding limited by Flippo*, 348 Md. at 695, 705 A.2d at 1151.

285. *Id.* at 356, 103 A. at 949.

286. *Id.* at 357, 103 A. at 949.

287. *Id.*

288. *Id.* at 356, 103 A. at 949.

289. *Id.* at 358, 103 A. at 949.

290. *Id.* at 361, 103 A. at 951 ("The doctrines of attractive nuisances . . . may be justly applied in some cases, but in this case we can find no just or reasonable ground upon which a recovery can be had.").

291. *Id.* at 359-60, 103 A. at 950.

292. *Id.* at 361, 103 A. at 951.

tion of the attractive nuisance doctrine to child trespassers on real and personal property.

In *Mondshour v. Moore*,²⁹³ the court declined to adopt the attractive nuisance doctrine where the plaintiff child trespassed on the motor vehicle of another.²⁹⁴ In that case, a six-year-old boy sustained injuries when he was pulled under the wheel of a bus as he showed his friend a “trick” that involved climbing on top of the rear wheel of the bus while it was stopped at an intersection.²⁹⁵ The plaintiff recognized that Maryland had long held that “[t]he owner of land owes not duty to a trespasser or licensee, even one of tender years, except to abstain from wilful or wanton misconduct and entrapment,”²⁹⁶ but urged the court to reject the rule to the extent it would deny recovery to a child injured by the chattels of another because he was a trespasser as to the chattel.²⁹⁷ The court characterized the plaintiff’s argument as essentially calling for application of the attractive nuisance doctrine.²⁹⁸ However, the court adhered strictly to its application of traditional premises liability rules in labeling the child a trespasser and determining there was no liability on the part of the defendant bus company.²⁹⁹ The court found that the child’s own negligence in performing his “trick” caused his injuries, not a breach of any duty owed to him by the bus company.³⁰⁰ Furthermore, the court reiterated its position that there is no distinction between trespass to realty and trespass to chattels for purposes of determining the duty owed by

293. 256 Md. 617, 261 A.2d 482 (1970), *holding limited by Flipppo*, 348 Md. at 695, 705 A.2d at 1151.

294. *Id.* at 620, 261 A.2d at 483 (noting that even in the jurisdictions which have accepted the attractive nuisance doctrine, it will not be applied to situations involving a child’s encounter with automobiles or other motor vehicles).

295. *Id.* at 619, 261 A.2d at 483.

296. *Id.* (internal quotation marks omitted) (quoting *Fopma v. Board of County Comm’rs*, 254 Md. 232, 234, 254 A.2d 351, 352 (1969) (per curiam); *Herring v. Christensen*, 252 Md. 240, 241, 249 A.2d 718, 719 (1969); *Levine v. Miller*, 218 Md. 74, 79, 145 A.2d 418, 421 (1958)).

297. *See id.* at 619-20, 261 A.2d at 483.

298. *Id.* at 620, 261 A.2d at 483; *see supra* note 253 (quoting the *Restatement’s* definition of the attractive nuisance doctrine).

299. *Mondshour*, 256 Md. at 623, 261 A.2d at 485. The court stated:

[I]t is, in the end, far better that the established rules of law should be strictly applied, even though in particular instances serious loss may be thereby inflicted on some individuals, than that by subtle distinctions invented and resorted to solely to escape such consequences, long settled and firmly fixed doctrines should be shaken, questioned, confused or doubted.

Id. (quoting *Demuth v. Old Town Bank*, 85 Md. 315, 320, 37 A. 266, 266 (1897) (citing *Lovejoy v. Ireland*, 17 Md. 525, 527 (1861))).

300. *Id.*

the owner to an individual injured by contact with the property.³⁰¹ While the court recognized the unfortunate nature of the child's injuries, it placed greater importance on continuity and stability "in the administration of the law."³⁰²

In *Murphy v. Baltimore Gas & Electric Co.*,³⁰³ the court considered two appeals dealing with landowner liability in one opinion.³⁰⁴ The first appellant asked the court to adopt the attractive nuisance doctrine in order to hold the owners of a pond liable for the drowning death of a child from a neighboring apartment building.³⁰⁵ However, the court relied on Maryland precedent expressly rejecting the attractive nuisance doctrine to deny the appellant's claim.³⁰⁶ The court made clear that "if there is to be a change in the law with respect to the duty owed a trespasser by a property owner . . . the Legislature should make it."³⁰⁷

The second appellant received an electric shock when he reached into an electric transformer box, which he believed to be a garbage bin, in search of his missing CB radio.³⁰⁸ Although the appellant made contact with the transformer under the mistaken belief that it was a safe container, the court found that he was a trespasser on BGE's personal property, and barred him from recovering for his injuries.³⁰⁹

Both appellants in *Murphy* asked the court to consider abandoning the traditional landowner liability categories in favor of a general negligence standard.³¹⁰ The court declined in both instances, finding those categories to be so deeply rooted in Maryland law as to

301. See *id.* at 622-23, 261 A.2d at 485 (quoting *State ex rel. Altson v. Baltimore Fidelity Warehouse Co.*, 176 Md. 341, 347-48, 4 A.2d 739, 742-43 (1939) (citing *Jefferson v. Birmingham Ry. & Elec. Co.*, 22 So. 546 (Ala. 1896); *Gay v. Essex Elec. St. Ry. Co.*, 34 N.E. 186 (Mass. 1893); *Rushenbergh v. St. Louis, Iron Mountain & S. Ry. Co.*, 19 S.W. 216 (Mo. 1891); *Emerson v. Peteler*, 29 N.W. 311 (Minn. 1886); *Bishop v. Union R.R. Co.*, 14 R.I. 314 (1884); *Hughes v. Macfie*, 2 Hurl. & Colt. 744 (1863))).

302. See *id.* at 624, 261 A.2d at 485 (reasoning that necessary changes should be made by the legislature, not by the courts (quoting *Demuth*, 85 Md. at 319-20, 37 A. at 266)).

303. 290 Md. 186, 428 A.2d 459 (1981), *holding limited by Flippo*, 348 Md. at 695, 705 A.2d at 1151.

304. *Id.* at 187-88, 428 A.2d at 461.

305. *Id.* at 193, 428 A.2d at 464.

306. *Id.* at 195, 428 A.2d at 465 (citing *Osterman v. Peters*, 260 Md. 313, 315, 272 A.2d 21, 22 (1971); *Hensley v. Henkels & McCoy, Inc.*, 258 Md. 397, 411, 265 A.2d 897, 905 (1970)).

307. *Id.*

308. *Id.* at 188-89, 428 A.2d at 461-62.

309. *Id.* at 193, 428 A.2d at 464.

310. *Id.* at 191, 428 A.2d at 463.

require no explanation for their necessity.³¹¹ However, in a separate opinion, Judge Davidson declared that it was time for Maryland “to abolish judicially-determined status distinctions as the sole determinant of the standard of care owed by an owner or occupier of land to an injured party” in favor of an ordinary negligence standard, applied to trespassers as well as invitees and licensees, that takes into consideration foreseeability and whether the owner exercised reasonable care under all of the circumstances.³¹²

The court inched closer to its holding in *Flippo* as it reviewed the duty owed to a child injured through contact with the personal property of another. In *Baltimore Gas & Electric Co. v. Lane*,³¹³ the court considered whether BGE owed a duty to a child who was injured when he rolled down a hill at a playground on one of BGE’s empty wooden cable spools.³¹⁴ Several boys took an empty spool from the work site and pushed it onto a playground where they took turns riding it down a hill.³¹⁵ After the plaintiff witnessed the other boys playing with the spool, he unsuccessfully attempted to ride it, but became frightened and fell off as the spool rolled over him.³¹⁶ In considering whether the child was a trespasser on BGE’s spool, the court noted that “[i]t is possible . . . for a person to trespass upon personal property without trespassing on the real property upon which the personal property sits.”³¹⁷ The boy was properly classified as an invitee with respect to the public playground where BGE’s spool rested.³¹⁸ However, the court also noted that there was a question whether BGE was in possession of the spool and exercising adequate control over it at the time of the accident.³¹⁹ If BGE had lost possession of the spool, then the

311. *Id.* The court explained:

The basis for the existing allocation of responsibility between owner and trespasser, reaffirmed today, has so frequently been broadcast by this Court over the last century that it would be superfluous to do more here than refer those interested to the cases earlier cited and the authorities relied on in each.

Id.

312. *Id.* at 201-02, 428 A.2d at 468 (Davidson, J., concurring in part and dissenting in part).

313. 338 Md. 34, 656 A.2d 307 (1995), *holding limited by Flippo*, 348 Md. at 695, 705 A.2d at 1151.

314. *Id.* at 40, 656 A.2d at 310. In the days prior to the accident, BGE was involved with a construction project in an area that included both a day care center and playground. *Id.*

315. *Id.* at 41, 656 A.2d at 310.

316. *Id.* at 41-42, 656 A.2d at 310.

317. *Id.* at 45, 656 A.2d at 312 (citing *Mondshour v. Moore*, 256 Md. 617, 619-20, 261 A.2d 482 (1970); *Grube v. Mayor of Baltimore*, 132 Md. 355, 103 A. 948 (1918); *State ex rel. Stansfield v. Chesapeake & Potomac Tel. Co.*, 123 Md. 120, 91 A. 149 (1914)).

318. *Id.* at 40, 656 A.2d at 310 (explaining that the boy resided at Meade Village Housing Project, which owned the playground).

319. *Id.* at 47-48, 656 A.2d at 313-14.

plaintiff could not have been a trespasser.³²⁰ Thus the jury could consider "whether BGE, as a former possessor of the spool, breache[d] a duty of care by failing to maintain adequate control over the spool."³²¹ While the court found that a reasonable trier of fact could conclude that BGE no longer maintained possession of the spool at the time of the accident, the court's decision was consistent with its earlier decisions in *Murphy*, *Mondshour*, *Grube*, and *Stansfield* that a possessor of personal property owes no duty of care to trespassers injured through contact with that property.³²²

In a concurring opinion joined by Judge Bell, Judge Chasanow pushed the court towards adoption of the attractive nuisance doctrine in the case where children are injured trespassing on personal property that is left on real property where the children have a right to be.³²³ Judge Chasanow believed that the plaintiff *was* trespassing on BGE's spool, but argued that the court should not extend the real property principle, that an owner of land owes no duty to trespassers, to children "who are invited onto land, but who may be trespassing on chattels."³²⁴ He believed that because of the circumstances attendant in those cases where the objects contacted by the children did not fit in the category of an attractive nuisance,³²⁵ adopting this limited application of the attractive nuisance doctrine would not be inconsistent with the court's previous rulings in *Stansfield*, *Grube*, and *Mondshour*.³²⁶

The majority opinion in *Lane*, like the opinions in *Murphy*, *Mondshour*, *Grube*, and *Stansfield*, adhered to the traditional landowner liability principle that one may be a trespasser to personal property even though they are not trespassing on the real property surrounding it.³²⁷ Because the majority of the *Lane* court determined that the child had not trespassed upon BGE's abandoned spool, it never considered an application of the attractive nuisance doctrine.³²⁸ Thus,

320. *Id.* ("A person cannot trespass to property unless another person has possession of the property.").

321. *Id.* at 48, 656 A.2d at 314.

322. *Id.* (discussing the holdings of these previous cases in relation to the instant case).

323. *See id.* at 58, 656 A.2d at 318 (Chasanow, J., concurring).

324. *Id.* at 54, 656 A.2d at 316.

325. *Id.* at 60-62, 656 A.2d at 319-20 (explaining that the bus wheel in *Mondshour* and the utility poles involved in *Grube* and *Stansfield* were not attractive nuisances likely to prompt children to trespass on the personal property).

326. *Id.* at 62-63, 656 A.2d at 320-21.

327. *Lane*, 338 Md. at 44-45, 656 A.2d at 312 (citing *Murphy v. Baltimore Gas & Elec. Co.*, 290 Md. 186, 191 n.3, 428 A.2d 459, 463 n.3 (1981); *Mondshour v. Moore*, 256 Md. 617, 619-20, 261 A.2d 482, 483 (1970); *Grube v. Mayor of Baltimore*, 132 Md. 355, 103 A. 948 (1918); *State ex rel. Stansfield v. Chesapeake & Potomac Tel. Co.*, 123 Md. 120, 91 A. 149 (1914)).

328. *Id.* at 47-48, 656 at 313-14.

prior to *Baltimore Gas & Electric Co. v. Flippo*, the Court of Appeals both maintained the position that the trespasser liability rule applied to those trespassing on personal property even if they were not trespassers on the land on which the real property was located and continued to reject the attractive nuisance doctrine.

3. *The Court's Reasoning.*—In *Baltimore Gas & Electric Co. v. Flippo*, the Court of Appeals declined to apply the principle limiting liability to trespassers in cases involving personal property when the plaintiff is a social guest on the real property on which the personal property is located.³²⁹ Because he was a social guest of the Gaines family, the court initially classified Flippo as a licensee by invitation on their real property.³³⁰ The court then determined that because BGE had a nonexclusive easement over the Gaineses' property and Flippo was rightfully located on that property, BGE could not prevent Flippo from playing in the tree.³³¹ Thus, Flippo could not be classified as a trespasser on BGE's easement.³³² However, because the court announced a new rule regarding plaintiffs trespassing on personal, but not real, property, it did not need to answer the question whether Flippo could be considered a trespasser as to BGE's electrical wire.³³³ The new rule provided that when a plaintiff trespasses on personal property but not on the real property where it is located, the traditional landowner liability rules limiting a property owner's liability to the trespasser will not apply.³³⁴ Instead, the court applied an ordinary negligence standard to determine whether BGE owed a legal duty to trim the trees in close proximity to its overhead wires.³³⁵ Because BGE could have reasonably foreseen that a child could be injured by coming into contact with its wires while climbing the tree in the Gaineses' backyard, the court reasoned that a jury could find that the utility company had a duty to either trim the tree or, in the alternative, to insulate the wires running through the upper branches of the tree to prevent such accidents from occurring.³³⁶ Judge Chasanow, writing for the majority, noted that the court's decision to uphold BGE's liability for Flippo's injuries based on principles of ordinary

329. *Flippo*, 348 Md. at 699, 705 A.2d at 1153.

330. *Id.* at 689, 705 A.2d at 1148; see *supra* notes 265-273 and accompanying text (discussing Maryland's landowner liability categories).

331. *Flippo*, 348 Md. at 689, 705 A.2d at 1148.

332. *Id.*

333. *Id.* at 694, 705 A.2d at 1150-51.

334. *Id.* at 694, 705 A.2d at 1151.

335. *Id.* at 699, 705 A.2d at 1153.

336. *Id.* at 702, 705 A.2d 1154-55.

negligence was consistent with the holdings on similar issues in other jurisdictions.³³⁷ Recognizing that its holding may be inconsistent with its previous holdings in *Baltimore Gas & Electric Co. v. Lane*,³³⁸ *Murphy v. Baltimore Gas & Electric Co.*,³³⁹ *Mondshour v. Moore*,³⁴⁰ *Grube v. Mayor of Baltimore*,³⁴¹ and *State ex rel. Stansfield v. Chesapeake & Potomac Telephone Co.*,³⁴² the court overruled those cases to the extent that they were inconsistent with its new rule.³⁴³

BGE raised contributory negligence as a defense, arguing that Flippo knew that electrical wires ran overhead in close proximity to the tree.³⁴⁴ BGE also highlighted the fact that Flippo understood the dangers associated with overhead electrical wires.³⁴⁵ However, the court rejected BGE's argument that Flippo was contributorily negligent as a matter of law.³⁴⁶ The court explained that in order to prove that someone was contributorily negligent as a matter of law, it must be shown that the individual engaged in "some prominent and decisive act which directly contributed to the accident and which was of such a character as to leave no room for difference of opinion thereon by reasonable minds."³⁴⁷ Because there was conflicting testimony at trial as to whether Flippo knew or should have known there were dangerous electrical wires running through the upper branches of the tree, the court determined that the issue was properly submitted to the jury for resolution.³⁴⁸

Furthermore, the court found that BGE suffered no prejudice from the trial court's refusal to give a jury instruction on assumption of risk.³⁴⁹ It pointed out that BGE would have to meet a higher stan-

337. *Id.* at 701, 705 A.2d at 1154 (citing *Dolata v. Ohio Edison Co.*, 441 N.E.2d 837 (Ohio Ct. App. 1981); *Petroski v. Northern Ind. Pub. Serv. Co.*, 354 N.E.2d 736 (Ind. Ct. App. 1976); *Alabama Power Co. v. Taylor*, 306 So. 2d 236 (Ala. 1975)).

338. 338 Md. 34, 656 A.2d 307 (1995), *holding limited by Flippo*, 348 Md. at 695, 705 A.2d at 1151.

339. 290 Md. 186, 428 A.2d 459 (1981), *holding limited by Flippo*, 348 Md. at 695, 705 A.2d at 1151.

340. 256 Md. 617, 261 A.2d 482 (1970), *holding limited by Flippo*, 348 Md. at 695, 705 A.2d at 1151.

341. 132 Md. 355, 103 A. 948 (1918), *holding limited by Flippo*, 348 Md. at 695, 705 A.2d at 1151.

342. 123 Md. 120, 91 A. 149 (1914), *holding limited by Flippo*, 348 Md. at 695, 705 A.2d at 1151.

343. *Flippo*, 348 Md. at 695, 705 A.2d at 1151.

344. *Id.* at 704-05, 705 A.2d at 1156.

345. *Id.* at 704, 705 A.2d at 1156.

346. *Id.* at 705, 705 A.2d at 1156.

347. *Id.* at 703, 705 A.2d at 1155 (internal quotation marks omitted) (quoting *Reiser v. Abramson*, 264 Md. 372, 378, 286 A.2d 91, 93 (1972)).

348. *Id.* at 705, 705 A.2d at 1156.

349. *Id.* at 707, 705 A.2d at 1157.

dard of proof in order to absolve itself from liability under an assumption of risk defense than it would under a contributory negligence defense.³⁵⁰ Relying on the Court of Special Appeals's declaration that "[a defendant who proved] a case of contributory negligence . . . would not necessarily establish an assumption of risk defense," the Court of Appeals reasoned that BGE had not met its burden for the latter defense.³⁵¹ Therefore, because the jury considered and rejected the less burdensome contributory negligence defense, the court determined that, even though it did not receive a separate instruction, the jury had essentially considered and rejected the assumption of risk defense as well.³⁵²

4. *Analysis.*—In *Baltimore Gas & Electric Co. v. Flippo*, the Court of Appeals applied existing Maryland tort law in unconventional ways to achieve the desired outcome. First, the court analyzed the duty owed to Flippo under principles of ordinary negligence rather than traditional premises liability law.³⁵³ Second, the court reasoned that a jury could find that BGE had a duty to trim trees located on its utility easements in residential areas.³⁵⁴ Third, the court determined that the trial court judge's failure to administer an assumption of risk jury instruction was nonprejudicial in light of BGE's failed contributory negligence defense.³⁵⁵ The effect is an opinion that closely approximates an application of the attractive nuisance doctrine³⁵⁶ without abandoning Maryland's long-standing refusal to adopt that doctrine.³⁵⁷

350. See *id.* (noting that a successful assumption of risk defense would require that BGE show "that [Flippo] actually knew of the potential danger of overhead electric wires and actually knew of the presence of this particular wire when he voluntarily subjected himself to a risk of contact with the wire by climbing the tree" (alteration in original) (internal quotation marks omitted) (quoting *Baltimore Gas & Elec. Co. v. Flippo*, 112 Md. App. 75, 96, 684 A.2d 456, 466 (1996), *aff'd*, 348 Md. 680, 705 A.2d 1144 (1998))); *supra* note 250 and accompanying text.

351. *Flippo*, 348 Md. at 707, 705 A.2d at 1157 (internal quotation marks omitted) (quoting *Flippo*, 112 Md. App. at 96, 684 A.2d at 466).

352. *Id.* at 707-08, 705 A.2d at 1157.

353. *Id.* at 699, 705 A.2d at 1153.

354. See *id.* at 701, 705 A.2d at 1154.

355. See *id.* at 707-08, 705 A.2d at 1157 (reasoning that "even if the trial court erred in not submitting an assumption of risk instruction to the jury, BGE did not suffer any prejudice" because "the jury's findings that Flippo was not contributorily negligent would have also precluded a finding that he assumed the risk").

356. See *supra* notes 254-264 and accompanying text (discussing the attractive nuisance doctrine).

357. See, e.g., *Baltimore Gas & Elec. Co. v. Lane*, 338 Md. 34, 63, 656 A.2d 307, 321 (1995) (Chasanow, J., concurring) ("By 1985 there were only about three states that had adopted neither the attractive nuisance doctrine nor a substitute such as the 'dangerous instrumentality' rule . . . nor the Restatement view. Of these states only one, Maryland, had

a. *Falling Between the Cracks of Maryland's Traditional Landowner Liability Analysis.*—In *Flippo*, the Court of Appeals retreated from its traditional hard-line application of the trespasser liability rule³⁵⁸ in favor of a more relaxed general negligence standard limited to cases involving trespass to personal property when the plaintiff is a social guest on the real property on which the personal property is located.³⁵⁹ In its opinion, the court first discussed *Flippo's* relation to the tree and BGE's electrical wires in terms of landowner liability.³⁶⁰ The Court of Appeals determined that because *Flippo* was a social guest of the Gaines family on the day the accident occurred, he is properly classified as a licensee by invitation.³⁶¹ The court supported its reasoning by noting that "*Flippo* climbed the Gaineses' tree with their permission."³⁶² Furthermore, the court found that *Flippo* was not a trespasser as to BGE's easement for utility wires.³⁶³ Easements are "nonpossessory interest[s] in the real property of another."³⁶⁴ The possessor of "an easement for ingress and egress" has the same protection from liability to trespassers as landowners when the possessor exercises "a degree of control over the land" effectively banning trespassers from the premises.³⁶⁵ However, BGE held only a nonexclusive easement for its utility wires over the Gaines property,³⁶⁶ and could not restrict or otherwise affect the Gaines family's use or enjoy-

reaffirmed its position in unqualified form in recent years." (omission in original) (internal quotation marks omitted) (quoting 5 HARPER ET AL., *supra* note 254, § 27.5, at 166)).

358. See *supra* notes 265-273 and accompanying text.

359. *Flippo*, 348 Md. at 699, 705 A.2d at 1153.

360. *Id.* at 693-94, 705 A.2d at 1150.

361. *Id.* at 689, 705 A.2d at 1148 (holding that "[a]s the Gaineses' social guest, *Flippo* had a right to be on the Gaineses' property").

362. *Id.* at 692, 705 A.2d at 1150.

363. *Id.* at 690, 705 A.2d at 1149.

364. *Boucher v. Boyer*, 301 Md. 679, 688, 484 A.2d 630, 635 (1984) (citing *Condry v. Laurie*, 184 Md. 317, 320, 41 A.2d 66 (1945)). The *Restatement of Property* defines easements as:

[a]n interest in land in the possession of another which

(a) entitles the owner of such interest to a limited use or enjoyment of the land in which the interest exists;

(b) entitles him to protection as against third persons from interference in such use or enjoyment;

(c) is not subject to the will of the possessor of the land;

(d) is not a normal incident of the possession of any land possessed by the owner of the interest, and

(e) is capable of creation by conveyance.

RESTATEMENT OF PROPERTY § 450 (1944).

365. See *Wagner v. Doebling*, 315 Md. 97, 107, 553 A.2d 684, 689 (1989).

366. *Flippo*, 348 Md. at 702, 705 A.2d at 1154-55.

ment of their property.³⁶⁷ Therefore, because Flippo was a licensee by invitation on the Gaines property, he could not be excluded from entering or playing in the area of land burdened by the easement.³⁶⁸

By classifying Flippo as a licensee by invitation, the court immediately distinguished the instant case from *State ex rel. Stansfield v. Chesapeake & Potomac Telephone Co.*,³⁶⁹ *Grube v. Mayor of Baltimore*,³⁷⁰ and *Mondshour v. Moore*.³⁷¹ In those cases the court determined that the injured parties were all wrongfully located within close proximity to the danger by trespassing on personal property.³⁷² Additionally, the plaintiffs in those cases all took affirmative steps towards making unauthorized contact with the defendant's property,³⁷³ whereas Flippo made accidental, unintentional contact with BGE's electrical wires.³⁷⁴ BGE argued that although Flippo's contact could be characterized as "accidental" or "inadvertent," it would nonetheless be considered a

367. See *Baltimore Gas & Elec. Co. v. Flippo*, 112 Md. App. 75, 83, 684 A.2d 456, 459 (1996) (stating that "BGE had neither a right of possession of the airspace in the vicinity of its wires or a right to preclude others from that airspace and thus has no basis to assert that [Flippo] was trespassing on its easement"), *aff'd*, 348 Md. 680, 705 A.2d 1144 (1998); *Millson v. Laughlin*, 217 Md. 576, 585, 142 A.2d 810, 814 (1958) (explaining that the possessors of the servient estate burdened by the easement are "entitled to use and enjoy [the] property to the fullest extent consistent with the reasonably necessary use thereof [of the holder of the dominant estate] in accordance with the terms and conditions of the grant").

368. *Flippo*, 348 Md. at 690, 705 A.2d at 1149.

369. 123 Md. 120, 91 A. 149 (1914), *holding limited by Flippo*, 348 Md. at 695, 705 A.2d at 1151.

370. 132 Md. 355, 103 A. 948 (1918), *holding limited by Flippo*, 348 Md. at 695, 705 A.2d at 1151.

371. 256 Md. 617, 261 A.2d 482 (1970), *holding limited by Flippo*, 348 Md. at 695, 705 A.2d at 1151.

372. See *id.* at 622-23, 261 A.2d at 484-85 (finding that the plaintiff was a trespasser to the transit company's personal property); *Grube*, 132 Md. at 359-60, 103 A. at 950 (finding that while the child plaintiff was properly located in the school yard, he had no permission and knew it was improper for him to climb the utility pole); *Stansfield*, 123 Md. at 123-25, 91 A. at 150 (explaining that, because there was no implied or express permission for the plaintiff to take the affirmative action of climbing the defendant's utility pole for his own personal benefit, he was classified as a trespasser).

373. See *Mondshour*, 256 Md. at 619, 261 A.2d at 483 (explaining that the plaintiff injured himself by climbing onto the wheel of a stopped transit bus in order to show his friend a "trick"); *Grube*, 132 Md. at 356, 103 A. at 949 (stating that plaintiff climbed up an electric utility pole in order to watch a baseball game); *Stansfield*, 123 Md. at 122, 91 A. at 149 (explaining that plaintiff used maintenance spikes on a utility pole in order to climb up the pole and rescue the family kitten).

374. See *Baltimore Gas & Elec. Co. v. Flippo*, 112 Md. App. 75, 86-87, 684 A.2d 456, 461 (1996) (explaining that "Flippo's 'entry upon' or contact with BGE's personal property, its electrical wire, was not an intentional or volitional act; it was an obviously involuntary reaction"), *aff'd*, 348 Md. 680, 705 A.2d 1144 (1998). While the plaintiffs in *Grube* and *Stansfield* did not voluntarily make contact with the electrical wires resulting in harm, they knew or should have known of the electrical current running through the utility wires attached to the poles. See *Grube*, 132 Md. at 361, 103 A. at 951; *Stansfield*, 123 Md. at 127, 91 A. at 151.

trespass.³⁷⁵ However, the court developed a new rule as it determined that traditional landowner liability rules would not apply where the plaintiff enjoyed the status of an invitee or licensee by invitation as to the real property where the personal property in question was located.³⁷⁶ Instead the court favored an ordinary negligence standard.³⁷⁷ Therefore, the court declined to entertain BGE's inadvertent trespasser argument.³⁷⁸

The reasoning behind the new rule announced by the court in *Flippo* is consistent with Judge Chasanow's concurring opinion in *Lane*.³⁷⁹ In *Lane*, Judge Chasanow argued for a rule that would eliminate the use of the trespasser doctrine in relation to all child plaintiffs who are lawfully present on the real property, but are injured as a result of trespass to personal property located thereon.³⁸⁰ He urged that the attractive nuisance doctrine should apply to cases "[w]here both the child and the chattel have equal rights on the realty."³⁸¹ In *Flippo*, the nonexclusive nature of BGE's easement for electrical

375. Brief and Appendix of Appellant at 9-19, *Flippo* (No. 4).

376. *Flippo*, 348 Md. at 694, 705 A.2d at 1151.

377. *Id.* at 697, 705 A.2d at 1152 (citing *Petroski v. Northern Ind. Pub. Serv. Co.*, 354 N.E.2d 736 (Ind. Ct. App. 1976); *Alabama Power Co. v. Taylor*, 306 So. 2d 236 (Ala. 1975); *Bridges v. Arkansas-Missouri Power Co.*, 410 S.W.2d 106 (Mo. Ct. App. 1966), *Mullen v. Wilkes-Barre Gas & Elec. Co.*, 77 A. 1108 (Pa. 1910)).

378. *Flippo*, 348 Md. at 693-94, 705 A.2d at 1150-51. Although the court never reached a conclusion on this issue in the instant case, it had previously considered landowner liability in the context of "inadvertent trespassers" in *Bramble v. Thompson*, 264 Md. 518, 520-21, 287 A.2d 265, 267 (1972). *Bramble* involved injured parties who labeled themselves "inadvertent trespassers" because they did not know they were trespassing on private property when they docked their boat, disembarked from it onto a pier and were "attacked and injured" by the landowner's dog. *Id.* In *Bramble*, the court declined to find an exception to the trespass doctrine based solely on the fact that the plaintiffs did not intend to trespass on the defendant's property. *Id.* at 522, 287 A.2d at 268. Still, those plaintiffs had taken affirmative steps towards entering the private property where they were injured. *Id.* at 522, 287 A.2d at 267. Because *Flippo* neither intended to trespass on BGE's property nor took affirmative steps towards making contact with the electrical wires, the Court of Special Appeals determined that "[a]bsent a volitional force or intent, an act cannot be affirmative in nature, and thus cannot be the subject of an action for trespass." *Flippo*, 112 Md. App. at 86, 684 A.2d at 461. Thus, if the "inadvertent trespasser" exception found inapplicable in *Bramble* were to be applied by the Court of Appeals, it would not have barred recovery for *Flippo*'s injuries. *Id.*

379. *Baltimore Gas & Elec. Co. v. Lane*, 338 Md. 34, 54, 656 A.2d 307, 316 (1995) (Chasanow, J., concurring).

380. *See id.* (discussing the traditional principle that the only duty owed to trespassers to real property regardless of their age is a duty to not "willfully or wantonly" injury them and arguing that the court "should not extend that well established real property principle to children who are invited onto land, but who may be trespassing on chattels").

381. *Id.* at 59, 656 A.2d at 319.

wires³⁸² and Flippo's status as a "licensee by invitation"³⁸³ resulted in application of the rule suggested by Judge Chasanow because "the child and the chattel" were both rightfully located on the Gaineses' realty.³⁸⁴ Therefore, the court's manipulation of the landowner liability categories in order to hold BGE liable for the child's injuries follows Judge Chasanow's earlier plea to adopt the attractive nuisance doctrine in Maryland, albeit limited to cases where the child enjoys the status of an invitee or licensee by invitation.³⁸⁵ Therefore, the court's holding in *Flippo* allows for a silent application of a limited attractive nuisance doctrine whereby a defendant's liability toward child plaintiffs who have an equal right to be located on the real property where the defendant's personal property is located will be evaluated under ordinary principles of negligence.³⁸⁶

The *Flippo* court, however, did not entirely embrace Judge Chasanow's suggestion in *Lane* that a limited attractive nuisance doctrine should apply to all children trespassing with respect to personal property, so long as the child and the chattel had "equal rights on the realty."³⁸⁷ Rather, the *Flippo* court made it clear that it adopted a conservative approach specifically limiting the application of ordinary principles of negligence to cases where the plaintiff enjoys the status of either an invitee or licensee by invitation with respect to the real property involved.³⁸⁸

The court's new rule is consistent with other jurisdictions that have opted to apply ordinary negligence principles as a form of an

382. See *Flippo*, 348 Md. at 689, 705 A.2d at 1148 (noting that both BGE, as owner of the dominant estate, and the Gaineses, as owners of the servient estate, are entitled to use the property).

383. *Id.*

384. See *id.* at 690, 705 A.2d at 1149 (concluding that "[s]ince BGE could not rightfully exclude an invitee of the servient estate owner from the premises, Flippo was not a trespasser as to BGE's easement" (citing *Wagner v. Doehring*, 315 Md. 97, 108 n.5, 553 A.2d 684, 689 n.5 (1989))).

385. See *supra* notes 380-381 and accompanying text.

386. *Flippo*, 348 Md. at 697-98, 705 A.2d at 1152-53 (citations omitted). All of the cases cited by the Court of Appeals as applying the ordinary negligence standard in cases involving trespasses to personal property involved child plaintiffs.

387. *Baltimore Gas & Electric Co. v. Lane*, 338 Md. 34, 59, 656 A.2d 307, 319 (1995) (Chasanow, J., concurring).

388. *Flippo*, 348 Md. at 699, 705 A.2d at 1153.

attractive nuisance doctrine.³⁸⁹ Even if the court's new rule had been applied in *Lane*, the court would have reached the same result.³⁹⁰

b. Reaching Beyond Traditional Landowner Liability in Search of a Plaintiff-Friendly Remedy: Analyzing BGE's Liability Under Ordinary Principles of Negligence.—After discussing the various landowner liability categories, the court shifted its analysis to a general negligence standard and determined that a jury could find BGE had a duty to trim the tree that Flippo was climbing the day of the accident.³⁹¹ In order to prove negligence, the plaintiff must show that the defendant owed a duty of reasonable care to the plaintiff, which the defendant failed to perform, resulting in injury or loss to the plaintiff.³⁹² The court elaborated upon the Court of Special Appeals's discussion of utility company liability in *Dageforde v. Potomac Edison Co.*,³⁹³ as it determined that BGE owed a duty of reasonable care to Flippo. In *Dageforde*, the Court of Special Appeals established that although a utility company would not be liable for injuries to trespassers or licensees on the company's electrical pole, the company could be held liable for accidents involving someone "in an adjacent position where they might be reasonably expected to come in close proximity to the source of danger."³⁹⁴ Flippo fit within the rule announced in *Dageforde* based on his status as a licensee by invitation on the Gainsees' property.³⁹⁵

389. See *Kahn v. James Burton Co.*, 126 N.E.2d 836, 625 (Ill. 1955) (explaining that although no special duty is generally owed towards children as a class of plaintiffs, the foreseeability of harm to children on the landowner's property will be a factor in determining the duty owed rather than just a strict adherence to landowner liability categories in determining duty).

390. See *Lane*, 338 Md. at 48, 656 A.2d at 314 (explaining that because BGE failed to maintain adequate control over the spool, *Lane* was not a trespasser as a matter of law to the spool).

391. *Flippo*, 348 Md. at 702, 705 A.2d at 1154-55.

392. *Id.* at 700, 705 A.2d at 1153-54 (quoting *Rosenblatt v. Exxon*, 335 Md. 58, 76, 642 A.2d 180, 188 (1994)). The *Restatement (Second) of Torts* explains:

When an act is negligent only if done without reasonable care, the care which the actor is required to exercise to avoid being negligent in the doing of the act is that which a reasonable man in his position, with his information and competence, would recognize as necessary to prevent the act from creating an unreasonable risk of harm to another.

RESTATEMENT (SECOND) OF TORTS § 298 (1966).

393. 35 Md. App. 37, 369 A.2d 93 (1977) (involving a twelve-year-old boy who sustained injuries after making contact with the electrical wires of a utility pole next to a tree in his yard as he climbed either the tree or the pole to pick apples from the tree).

394. *Id.* at 42, 369 A.2d at 96 (citing *State ex rel. Stansfield v. Chesapeake & Potomac Tel. Co.*, 123 Md. at 127, 91 A. at 151 (1914)).

395. *Flippo*, 348 Md. at 689, 705 A.2d at 1148.

The court has long recognized the importance of employing a standard of reasonableness guided by public safety concerns.³⁹⁶ The court recognized that most jurisdictions make distinctions in cases involving contact with electricity based on the classification of the injured party (i.e. as a trespasser or as a licensee by invitation).³⁹⁷ The court has consistently held that it is more desirable to adhere to standard applications of the law at the expense of a difficult or unpleasant outcome than to alter interpretations for the benefit of a single plaintiff.³⁹⁸ However, in following other jurisdictions, the court decided that ordinary negligence analysis should apply rather than the principle limiting liability to trespassers based on Flippo's permission to be on the real property.³⁹⁹

The dangerous nature of electricity suggests that a higher degree of care may be required in its use and maintenance.⁴⁰⁰ In *Flippo*, the court found that a reasonable trier of fact could conclude that BGE owed a limited duty to trim the tree in the Gainses' backyard⁴⁰¹ based on the foreseeable nature of the accident.⁴⁰² The court argued that

396. See *Pindell v. Rubenstein*, 139 Md. 567, 580-81, 115 A. 859, 864 (1921) (finding it "unreasonable" and "contrary to the public safety and welfare" to allow someone with property adjacent to a public highway where there are many pedestrians, including "children of tender ages," to leave unattended broken fixtures on his fence which are poised to cause injury to those utilizing the highway).

397. See *Flippo*, 348 Md. at 698-99, 705 A.2d at 1153.

398. See, e.g., *Osterman v. Peters*, 260 Md. 313, 317, 272 A.2d 21, 23-24 (1971). The *Osterman* court, noting that "hard cases make bad law," stated:

"[B]etter that the established rules of law should be strictly applied, even though in particular instances serious loss may be thereby inflicted on some individuals, than that by subtle distinctions, invented and resorted to solely to escape such consequences, long-settled and firmly-fixed doctrines should be shaken, questioned, confused, or doubted."

Id. (internal quotation marks omitted) (quoting *Demuth v. Old Town Bank*, 85 Md. 315, 319-20, 37 A. 266 (1897) (citing *Lovejoy v. Ireland*, 17 Md. 525, 527 (1861))).

399. *Flippo*, 348 Md. 699, 705 A.2d 1153.

400. See *id.* at 700, 705 A.2d at 1154 (defining the scope of an electric company's duty to use reasonable care to include "persons who are in lawful proximity to its electric wires, and who could reasonably be anticipated to come, accidentally or otherwise, in contact with them" (citing *State ex rel. Stansfield v. Chesapeake & Potomac Tel. Co.*, 123 Md. 120, 125-26, 91 A. 149, 151 (1914); *Brown v. Edison Elec. Co.*, 90 Md. 400, 406, 45 A. 182, 183 (1900))); *Baltimore Gas & Elec. Co. v. Flippo*, 112 Md. App. 75, 89, 684 A.2d 456, 463 (1996) ("In light of the gravity of the potential harm, those who transmit electrical current must exercise a correspondingly high degree of care in so doing." (citing *Manaia v. Potomac Elec. Power Co.*, 268 F.2d 793 (4th Cir. 1959); *Conowingo Power Co. v. Maryland*, 120 F.2d 870 (4th Cir. 1941)), *aff'd*, 348 Md. 680, 705 A.2d 1144 (1998)).

401. See *Flippo*, 348 Md. at 701, 705 A.2d at 1154 ("We do not hold that BGE has a blanket duty to trim all trees that are located near its overhead electrical wires." (citing *Flippo*, 112 Md. App. at 88, 684 A.2d at 462)).

402. See *id.* at 702, 705 A.2d at 1154 ("[T]here was sufficient evidence to permit a jury to conclude that BGE could have reasonably foreseen that a child may have been injured as a

because BGE had specific knowledge and documentation of the hazards associated with the Gaineses' tree,⁴⁰³ they were under a duty to either trim the tree or insulate the wires running through it.⁴⁰⁴ Yet, the Gaines family also knew that the branches on the tree were easily climbable and could lead to a dangerous encounter with the utility wires and chose to do nothing about it.⁴⁰⁵

The court's reasoning that BGE owed an affirmative duty of reasonable care to Flippo found additional support in the specifications of BGE's easement for the utility wires.⁴⁰⁶ The easement gave BGE unfettered permission to enter the property in order to maintain trees in close proximity to its utility wires.⁴⁰⁷ Furthermore, the grant of the easement was conditioned upon certain concessions in order to comply with the "aesthetic requirements" of the real estate developer.⁴⁰⁸ BGE agreed specifically to run its utility wires along the rear portions of the properties rather than in the front along the street and "to use poles ten feet shorter than it normally or regularly used."⁴⁰⁹ Thus, the increased burden on BGE of trimming trees like the one at issue in this case flows from the increased degree of risk involved under the circumstances.⁴¹⁰

5. *Conclusion.*—The Court of Appeals's decision in *Baltimore Gas & Electric Co. v. Flippo* provides a plaintiff-friendly solution in a common tort case. Yet it accomplishes this task at the expense of dis-

result of its failure to trim the tree that Flippo was climbing or insulate the electric wire that ran through the tree.").

403. See *id.*, 705 A.2d at 1155 (explaining that BGE had classified the Gaineses' tree as "climbable"); see also *Flippo*, 112 Md. App. at 89-90, 684 A.2d at 463 (determining that, because BGE was aware of the hazards associated with climbable trees such as the white pine located on the Gaines property, it "had implied cognizance of a reasonably foreseeable harm to children such as J.J. Flippo").

404. See *Flippo*, 348 Md. at 702, 705 A.2d at 1154.

405. See Reply Brief of Appellant at 8-9, *Baltimore Gas & Elec. Co. v. Flippo*, 348 Md. 680, 705 A.2d 1144 (1998) (No. 4) (explaining that Mr. Gaines had warned Flippo not to climb up "too high" in the tree as an indication that Mr. Gaines knew the children frequently climbed the tree and wanted to make sure that Flippo and the other children fully appreciated the danger of the electrical wires which ran through it).

406. See *Flippo*, 112 Md. App. at 90, 684 A.2d at 463 (explaining the terms of BGE's easement).

407. See *Flippo*, 348 Md. at 702, 705 A.2d at 1155 (noting that BGE had the right to trim trees under its easement "in order to provide clearance"); see also *Flippo*, 112 Md. App. at 90, 684 A.2d at 463 (stating that the easement "expressly conferred on BGE the right of access at all times to the lines, the right to trim, top or cut down trees adjacent to the lines to provide ample clearance").

408. *Flippo*, 112 Md. App. at 90, 684 A.2d at 463.

409. *Id.*

410. See *id.* (explaining that the "concessions increased the degree of care necessary to avoid such accidents as occurred to the minor plaintiff in this case").

torting the traditional landowner liability categories. As advocated by Judge Chasanow's concurring opinion in *Lane*, the court rendered obsolete the traditional applications of Maryland landowner liability law for child trespassers to personal property in cases where the child has a right to be on the real property it rests upon.⁴¹¹ Furthermore, the court left the door open for creation of a broad duty for public utility companies that would be unnecessarily burdensome. The Court of Appeals silently adopted an attractive nuisance doctrine applicable only to trespasses upon personal property by children classified as invitees or licensees by invitation. Although beneficial to the particular child injured in the instant case, the court's decision came at the expense of Maryland's long-established refusal to dilute its landowner liability analysis with the attractive nuisance doctrine.

DAWN P. LANZALOTTI

C. Limiting Tort Indemnity in Maryland to the Realm of Constructive Liability

In *Franklin v. Morrison*,⁴¹² the Court of Appeals unanimously held that Maryland law no longer permits indemnification based on degrees of negligence, while maintaining the rule allowing tort indemnity based on the active-passive negligence distinction.⁴¹³ In so ruling, the court created confusing precedent because application of the active-passive negligence distinction necessarily relies on a comparison of the negligence of joint tortfeasors to determine, if such a determination can be made, who is primarily at fault. The active-passive distinction retained by the court depends only on the legal relationship between the tortfeasors. As such, the court should have abandoned the active-passive negligence distinction entirely to provide a better rule as to when tort indemnity will be allowed in Maryland. Although the *Franklin* decision implies that tort indemnity should be permitted only in limited circumstances, primarily those in which liability is im-

411. See *Baltimore Gas & Elec. Co. v. Lane*, 338 Md. 34, 54, 656 A.2d 307, 316 (1995) (Chasanow, J., concurring) (arguing that the traditional trespasser liability doctrine should not apply to children with respect to trespasses upon chattels when the child is properly located on the premises).

412. 350 Md. 144, 711 A.2d 177 (1998).

413. *Id.* at 168-69, 711 A.2d at 189-90. The active/passive negligence distinction entitles a passively negligent tortfeasor to indemnity from an actively negligent tortfeasor. *Id.* at 160, 711 A.2d at 185-86 (citing *W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS* § 51, at 343 (5th ed. 1984)). The label of "active-passive" negligence is used to describe the difference in the "gravity of the fault of two tortfeasors" or when there is "a disproportion or difference in character of the duties owed by the two to the injured plaintiff." *Id.* at 155, 711 A.2d at 183 (quoting *KEETON ET AL., supra*, § 51, at 343-44).

posed on the prospective indemnitee as the result of a legal relationship between the tortfeasors,⁴¹⁴ the court does not expressly state this policy.⁴¹⁵ Had the court concisely stated that in the absence of a special relationship in which the indemnitee's liability to the plaintiff is vicarious or constructive between the tortfeasors, tort indemnity should not be applied, there would be more predictability in Maryland's tort indemnity law.

1. *The Case.*—On December 24, 1992, Michael Franklin (Franklin) took his 1992 Chevrolet S-10 Blazer (the Blazer) to a Jiffy Lube in Beverly, Massachusetts, owned and operated by a franchisee, Lube 495, Inc. (Jiffy Lube), for routine servicing.⁴¹⁶ The routine servicing required a technician to remove the rear differential check plug to check and, if necessary, replenish the lubricant level, and then replace the plug.⁴¹⁷ In performing this routine check, the technician either failed to replace or improperly replaced the differential check plug, causing the differential fluid to leak in a gradual, undetectable manner over the next several weeks.⁴¹⁸ This gradual process ultimately produced sudden mechanical failure and disabled Franklin's Blazer from moving.⁴¹⁹

Franklin was not aware of any problems with his rear differential, nor had he experienced any mechanical difficulties, until January 16, 1993, when he was driving on Route 50 in Prince George's County at highway speed in the middle of the three westbound lanes.⁴²⁰ At that time, Franklin heard a gear grinding noise emanating from the Blazer's undercarriage, but the noise temporarily ceased.⁴²¹ The noise then resumed, accompanied by a violent shaking and a burning smell.⁴²²

414. A legal relationship between the tortfeasors may impose liability on one tortfeasor only vicariously for the conduct of the other. See *infra* notes 479-489 (examining the legal relationships recognized by Maryland courts).

415. *Franklin*, 350 Md. at 156-58, 711 A.2d at 183-84. For a further discussion of the limited situations in which tort indemnity may be proper after *Franklin*, see *infra* notes 591-611 and accompanying text.

416. *Franklin*, 350 Md. at 147, 711 A.2d at 179.

417. *Id.*

418. *Id.* Without adequate lubrication, the gears and bearings within the differential gradually melted, fused together, and broke off due to excessive friction and heat. *Id.*

419. *Id.* at 148, 711 A.2d at 179.

420. *Id.* at 147, 711 A.2d at 179.

421. *Id.* at 147-48, 711 A.2d at 179.

422. *Id.* at 148, 711 A.2d at 179. When the violent shaking occurred, Franklin tapped his brakes to maintain control of the Blazer while unsuccessfully attempting to drive the Blazer to the right shoulder of the highway. *Id.*

After Franklin first heard the noise, the Blazer continued to move, traveling approximately 2100 feet before it decelerated rapidly and steadily.⁴²³ The Blazer came to a complete stop in the center lane.⁴²⁴ Franklin then exited the car and proceeded to the side of the road where he waved his arms in an effort to alert oncoming traffic to the disabled Blazer.⁴²⁵

Darlene Morrison, who was traveling behind Franklin in a 1990 Dodge Minivan with her two children, managed to stop suddenly behind the disabled Blazer.⁴²⁶ While stopped in the center lane, Mrs. Morrison's minivan was struck by a tractor-trailer driven by Dale Mettenbrink and owned by National Carriers, Inc. (National Carriers).⁴²⁷ The tractor-trailer dragged the minivan several hundred feet, resulting in a fiery explosion that killed Mrs. Morrison and her two children.⁴²⁸

In March 1994, Glenn Morrison (Morrison), individually and as personal representative of the estates of his wife Darlene Morrison and his children, sued defendants Franklin, National Carriers, and Jiffy Lube.⁴²⁹ Defendants filed cross-claims for indemnification and contribution against each other.⁴³⁰

On August 31, 1995, almost one month before trial, Morrison settled the claims against Defendants National Carriers and Jiffy Lube.⁴³¹ Under the agreement, all of Morrison's claims against the settling defendants were released in consideration of a payment of \$3.7 million.⁴³² Before trial commenced, Morrison dismissed his claims against National Carriers and Jiffy Lube, and soon thereafter Franklin dismissed his cross-claims against National Carriers.⁴³³ However, Franklin maintained his cross-claim against Jiffy Lube for contribution

423. *Id.* at 159, 711 A.2d at 185.

424. *See id.* at 148, 711 A.2d at 179. Franklin testified that he was unable to pull over after he learned of the problem because the Blazer was quickly decelerating and there was heavy traffic in the right lane. *Id.*

425. *Id.*, 711 A.2d at 179-80. Although Franklin allegedly tried to alert oncoming traffic by waving his arms, he did not put on his hazard lights before he exited the Blazer. *Id.* at 160, 711 A.2d at 185.

426. *Id.* at 148, 711 A.2d at 180. Mrs. Morrison was unable to change lanes because of passing traffic. *Id.*

427. *Id.* at 148-49, 711 A.2d at 179-80.

428. *Id.* at 149, 711 A.2d at 180.

429. *Id.*

430. *Id.*

431. *Id.*

432. *Id.* at 149-50, 711 A.2d at 180.

433. *Id.* at 151, 711 A.2d at 181.

and indemnification, and Jiffy Lube remained in the case and maintained its cross-claim against Franklin for contribution.⁴³⁴

At trial, Morrison was proceeding solely against Franklin; defendants Franklin and Jiffy Lube were proceeding against each other.⁴³⁵ During the trial, Morrison presented evidence from which the jury could find that Franklin was negligent in two regards: (1) in failing to move the Blazer to a safe location after he began experiencing mechanical difficulties; and (2) in failing to warn approaching motorists of the disabled Blazer.⁴³⁶ In defending himself against these claims, Franklin argued that any negligence on his part was passive negligence and that the accident was caused by the active negligence of Jiffy Lube in failing to properly replace the check plug after servicing the Blazer.⁴³⁷ Franklin's claim for indemnity against Jiffy Lube was based on the active-passive negligence distinction. "At the close of the evidence, the trial court denied, *inter alia*, Franklin's motion for judgment on his cross-claim for indemnity against Jiffy Lube."⁴³⁸

The jury returned a verdict for Morrison in his individual and representative capacities in the amount of \$10,756,000 after concluding that Franklin and Jiffy Lube were negligent and each proximately caused the accident, but that National Carriers did not proximately cause the accident.⁴³⁹ The court remitted the award to \$6,806,000 in accordance with Maryland's statutory cap on noneconomic damages, and entered judgment for Morrison against Franklin in the remitted amount.⁴⁴⁰ The judgment against Morrison was further reduced to \$3,403,000 at the hearing on posttrial motions when the court applied Maryland's Uniform Contribution Among Tortfeasors Act (UCATA) to the judgment.⁴⁴¹

Franklin appealed to the Court of Special Appeals, arguing that among the five errors of the circuit court was the court's failure to

434. *Id.* For a further discussion on the distinctions between contribution and indemnity, see *infra* note 449 and accompanying text.

435. *Franklin*, 350 Md. at 151, 711 A.2d at 181.

436. *Id.* at 151-52, 711 A.2d at 181.

437. *Id.* at 152, 711 A.2d at 181.

438. *Id.*

439. *Id.* Special interrogatories were submitted to the jury, asking whether National Carriers, Jiffy Lube, and Franklin each were negligent and whether that negligence proximately caused the accident. *Id.* The jury answered "yes" for both Jiffy Lube and Franklin and "no" for National Carriers. *Id.*

440. *Id.* (applying the statutory cap on noneconomic damages set forth in MD. CODE ANN., CTS. & JUD. PROC. § 11-108 (1995)).

441. *Id.* at 152, 711 A.2d at 181-82.

grant Franklin's claim for indemnity from Jiffy Lube.⁴⁴² Franklin argued, as he did before the circuit court, that he was entitled to indemnity from Jiffy Lube because he was merely passively negligent while Jiffy Lube was actively negligent.⁴⁴³ The Court of Special Appeals affirmed the decision of the circuit court in an unreported decision, holding that Franklin's negligence was active negligence as a matter of law, and that therefore he was not entitled to indemnification from Jiffy Lube.⁴⁴⁴ Franklin petitioned for certiorari, which the Court of Appeals granted.⁴⁴⁵

2. *Legal Background.*—Indemnity is defined as "reimbursement,"⁴⁴⁶ and involves shifting the entire loss to the indemnitor. Indemnity may be based on an express contract or implied in law.⁴⁴⁷ Tort indemnity arises out of a "contract implied by law"⁴⁴⁸ and arose in response to the recognition that the rule barring contribution among joint tortfeasors caused injustice in certain cases.⁴⁴⁹ Although the early applications of indemnity law involved cases in which one tortfeasor's liability was exclusively vicarious, courts began to address the injustice which arose in cases where both parties were at fault, but one was much less culpable than the other.⁴⁵⁰ With this expanded notion of tort indemnity, the situations in which tort indemnity was proper were no longer restricted to situations in which the indemni-

442. *Id.* at 153, 711 A.2d at 182. Franklin also argued on appeal that the jury should have been furnished with the Release and Indemnity Agreement executed by the other parties, and that the circuit court improperly calculated the credit under the release. *Id.*

443. *Id.*

444. *Id.* The Court of Special Appeals also found that the release did not have to be disclosed to the jury, and that the circuit court had correctly calculated the extent of the credit under the release. *Id.*

445. 350 Md. 144, 711 A.2d 177 (1998).

446. BLACK'S LAW DICTIONARY 769 (6th ed. 1990). *Black's Law Dictionary* further defines indemnity as "[a] contractual or equitable right under which the entire loss is shifted from a tortfeasor who is only technically or passively at fault to another who is primarily or actively responsible." *Id.* (citing *Moorhead v. Waelde*, 499 So. 2d 387, 389 (La. Ct. App. 1986)).

447. *Franklin*, 350 Md. at 154, 711 A.2d at 182.

448. *Id.* (citing R.A. Leflar, *Contribution and Indemnity Between Tortfeasors*, 81 U. PA. L. REV. 130, 146 (1932)).

449. *Id.* While indemnity permits total reimbursement, contribution refers to the "[r]ight of one who has discharged a common liability to recover of another also liable, the aliquot portion which he ought to pay or bear." BLACK'S LAW DICTIONARY, *supra* note 446, at 328. In other words, a defendant may be liable for the total loss in an indemnity action, but in a contribution action, he is only chargeable with a ratable proportion. J.R. Kemper, Annotation, *Contribution or Indemnity Between Joint Tortfeasors on Basis of Relative Fault*, 53 A.L.R.3d 184, 190 (1973) (citing 41 AM. JUR. 2d *Indemnity* §§ 2, 3 (1967)).

450. *Franklin*, 350 Md. at 154, 711 A.2d at 182 (quoting *Vertecs Corp. v. Reichhold Chems., Inc.*, 661 P.2d 619, 621 (Alaska 1983)).

tee was only vicariously liable. To fully understand the legal background of the *Franklin* decision, it is necessary to examine both indemnity at common law and indemnity law in Maryland.

a. *Indemnity at Common Law*.—At common law, whenever the wrongful act of one person results in liability being imposed on another merely by inference of law, “the latter may have indemnity from the person actually guilty of the wrong.”⁴⁵¹ However, an exception to this general indemnity rule, established in *Merryweather v. Nixan*,⁴⁵² holds that there is no right to contribution or indemnity among fault-bearing tortfeasors.⁴⁵³ The *Merryweather* doctrine evolved as an exception to the general indemnity rule, and was strictly applied by the English courts to cases where the parties were *equally* at fault.⁴⁵⁴

Many jurisdictions in the United States, including Maryland,⁴⁵⁵ also recognized the harshness of the *Merryweather* rule that there can be no contribution between joint actual tortfeasors.⁴⁵⁶ The harshness of the rule was the inability to distribute the loss equally among joint tortfeasors. This recognition resulted in several jurisdictions making efforts to alleviate this problem by establishing exceptions to the *Merryweather* rule.⁴⁵⁷ There were many disparities among the various solutions formulated to relax the harshness of the rule that there is no right to contribution among joint tortfeasors.⁴⁵⁸ Many such solutions involved changes in the law of tort indemnity.

451. See *Baltimore & Ohio R.R. Co. v. County Comm'rs*, 113 Md. 404, 414, 77 A. 930, 933 (1910) (citing *Pearson v. Skelton*, 150 Eng. Rep. 533, 533 (K.B. 1836); *Wooley v. Batte*, 172 Eng. Rep. 188, 188-89 (K.B. 1826)), *overruled by Franklin*, 350 Md. at 167, 711 A.2d at 189.

452. 101 Eng. Rep. 1337 (K.B. 1799). The case involved a claim for contribution, which was denied, because both the plaintiff and defendant had participated in an act of conversion and, as such, were both actual tortfeasors. *Id.*

453. See *B&O Railroad*, 113 Md. at 414, 77 A. at 933 (citing *Merryweather*, 101 Eng. Rep. 1337). At common law, this exception was limited to cases where the party seeking indemnity or contribution acted *in pari delicto* with the other. See *id.* at 414, 77 A. at 933. *Black's Law Dictionary* defines “*in pari delicto*” as “in equal fault; equally culpable or criminal, in a case of equal fault or guilt.” BLACK'S LAW DICTIONARY, *supra* note 446, at 791.

454. See *B&O Railroad*, 113 Md. at 414-15, 77 A. at 933 (“The Courts do not favor extension of [the *Merryweather*] rule, and have shown a decided disposition to confine the exception to cases clearly falling within it.” (citations omitted)).

455. See *infra* notes 459-509 and accompanying text (discussing the evolution of tort indemnity in Maryland).

456. See *Kemper*, *supra* note 449, at 190 (noting the severity of the common-law rule barring contribution between tortfeasors).

457. *Id.*

458. *Id.* The variety of remedies, as well as the severity of the *Merryweather* rule, served as the impetus for the National Conference on Uniform State laws to draft the Uniform Contribution Among Tortfeasors Act in 1939. *Id.* at 190-91 (citing UNIF. CONTRIBUTION AMONG TORTFEASORS ACT §§ 1-12 (amended 1995), 12 U.L.A. 185 (1996)).

b. *Indemnity Law in Maryland.*—At the time of the *Franklin* decision, Maryland courts lacked the objective criteria necessary for predictability in the law of tort indemnity. In Maryland, the common-law rule of indemnity was first recognized in *Chesapeake & Ohio Canal Co. v. County Commissioners*.⁴⁵⁹ In *Chesapeake*, the Court of Appeals held that Alleghany County, which had been held liable for injuries caused by the defective condition of a bridge, was entitled to indemnity from the company that built the bridge.⁴⁶⁰ The court determined that indemnity was reasonable because the county was not in *pari delicto*⁴⁶¹ with the company, and that the defective condition was caused by and should have been repaired by the company.⁴⁶² Because the County's liability was not based on any negligence on their part but was purely based on its nondelegable duty to maintain the bridge, it was consistent with the longstanding rule of common law tort indemnity. The court reasoned that it did not "perceive from the nature and facts of this case any ground for defeating the [county's] suit, because of the principle of *pari delicto*."⁴⁶³ Stating that it was not fair to bar indemnity to a defendant who could not "be charged with more than a constructive default,"⁴⁶⁴ the court recognized the longstanding common-law rule of implied tort indemnity but introduced the notion of degrees of negligence.⁴⁶⁵ Despite this new language, the court reinforced the common-law principle that a party who was held liable based on a legal relationship, without any personal fault or participa-

The Uniform Contribution Among Tortfeasors Act of 1939 was "designed to embody a common policy expressive of the tendency, apparent in the law, to abandon the common-law rule denying the right of contribution between joint tortfeasors." *Id.* at 197 (setting forth reasons for the creation of the Act); see also Commissioners' Comment, 12 U.L.A. 187-89 (1996).

Under the Act, the right to contribution is based on a pro rata calculation. 12 U.L.A. 185. While the Act included an optional section that authorized consideration of the relative degrees of fault among joint tortfeasors in determining their shares of common liability, Maryland rejected this section as did the majority of states that have adopted the 1939 Act. *Id.* See also Kemper, *supra* note 449, at 191-92 (explaining that only Arkansas, Delaware, Hawaii and South Dakota have included the optional section 2(4) in their enactments of the 1939 Act).

In 1955, the Commissioners on Uniform State Laws drafted a new Contribution Among Joint Tortfeasors Act which recognizes that there is no need for a comparative negligence or degree of fault rule in contribution cases. Commissioners' Comment, 12 U.L.A. 246. This recognition is in accordance with the approach taken by the majority of jurisdictions that adopted the 1939 Act. Kemper, *supra* note 449, at 191.

459. 57 Md. 201 (1881).

460. *Id.* at 223.

461. *Id.* at 224; see *supra* note 453 and accompanying text (defining "in *pari delicto*").

462. *Chesapeake*, 57 Md. at 224.

463. *Id.* at 220.

464. *Id.* at 223.

465. *Id.*

tion in the action giving rise to the liability, would be entitled to recover from the party actually responsible for the injury.⁴⁶⁶

Maryland's notion of common-law tort indemnity was expanded in *Baltimore & Ohio Railroad Co. v. County Commissioners*.⁴⁶⁷ The facts underlying the case involved an accident, in which a traveler was killed, caused by an unsafe condition of a highway resulting from changes made in the road by a railroad company when it relocated its tracks.⁴⁶⁸ After the County was held liable for the injuries, the county commissioners sought indemnification from the railroad that had created the unsafe condition in the public road.⁴⁶⁹ Although the Court of Appeals found that the county had been negligent in not repairing the road after receiving notice of the defective condition,

the Court could not say as a matter of law upon the facts before it that [the county] participated with the defendant [railroad company] in the creation of this dangerous nuisance or that [the county] was equally guilty with [the railroad company] with respect to the consequences which ensued.⁴⁷⁰

Thus, after comparing the negligence of the two tortfeasors, the court concluded that they were not "equally culpable"⁴⁷¹ and permitted the county commissioners to receive indemnity from the railroad company.⁴⁷²

B&O Railroad further enlarged the concept of tort indemnity because the court allowed the county to recover even though it had notice of the defective condition and negligently failed to repair it.⁴⁷³ This expanded notion of tort indemnity included cases where the indemnitee, although negligent, was less culpable than the indemnitor. In determining whether the indemnitee was less culpable than the

466. *Id.*

467. 113 Md. 404, 77 A. 930 (1910), *overruled by Franklin*, 350 Md. at 167, 711 A.2d at 189. In *B&O Railroad*, the Court of Appeals articulated the general rule that "wherever the wrongful act of one person results in liability being imposed on another, the latter may have indemnity from the person actually guilty of the wrong." *Id.* at 414, 77 A. at 933. In addition to articulating the general rule, the court recognized an exception which prevents indemnity between actual tortfeasors, that is, cases in which each tortfeasor participates equally in the action giving rise to the lawsuit. *Id.* However, the court explained that it does not favor the extension of this exception and stated that to render this exception applicable, "[t]here must be joint participation in the tort and the parties must be in equal degree guilty." *Id.*

468. *Id.*

469. *Id.* at 411, 77 A. at 932.

470. *Id.* at 416-17, 77 A. at 934.

471. *Id.* at 416, 77 A. at 934.

472. *Id.*

473. *Id.* at 416-17, 77 A. at 934.

indemnitor, *B&O Railroad* introduced the concept of "relative fault"⁴⁷⁴ among tortfeasors by comparing the negligence of the county, in failing to repair the road, with that of the canal company, which was solely responsible for action giving rise to the lawsuit.⁴⁷⁵

Maryland courts have articulated the concept that there is a right to indemnity where, although both parties have breached a legal duty and are, as such, negligent, the indemnitee is less culpable than the indemnitor in various ways. Generally speaking, the test used to determine whether to grant indemnity has been labeled the active-passive negligence distinction.⁴⁷⁶ Indemnity is proper when the participation of the indemnitee, although negligent, is considered passive or secondary, while that of the indemnitor constitutes active negligence.⁴⁷⁷

Although it was clear by the middle of this century that tort indemnity was available to a defendant who is only "passively" negligent from a defendant who is "actively" negligent,⁴⁷⁸ Maryland courts lacked concrete guidelines to determine whether a tortfeasor's negligence was active or passive. As a result, the rules for indemnity among joint tortfeasors have been established through judicial decisions based on varying interpretations of what the active-passive negligence distinction is.

One of the earliest applications of the active-passive negligence distinction arose in the context of legal relationships, where a party who had not participated in the action giving rise to the injury was held constructively liable. In one such case, the Court of Appeals determined that an employer should have a right for indemnity against an employee for damages suffered as a result of the employer's "vicarious, or imputed" liability under the doctrine of respondeat superior.⁴⁷⁹ Because the employer's liability was not predicated upon active negligence, he was entitled to recover from his employee whose

474. *Id.*

475. *See id.* at 416, 77 A. at 934 ("We cannot hold upon the evidence in this record as a matter of law that the parties, as between themselves, were equally culpable . . .").

476. *Board of Trustees of Baltimore County Community College v. RTKL Assocs., Inc.*, 80 Md. App. 45, 56, 559 A.2d 805, 811 (1989) (citing *Gardenvillage Realty Corp. v. Russo*, 34 Md. App. 24, 40, 366 A.2d 101 (1976)).

477. *Pyramid Condominium Ass'n v. Morgan*, 606 F. Supp. 592, 595 (D. Md. 1985) (mem.).

478. *See Hartford Acc. & Indem. Co. v. Scarlett Harbor Assocs. Ltd. Partnership*, 109 Md. App. 217, 277-78, 674 A.2d 106, 135 (1996) ("[I]n negligence cases, Maryland follows the 'active/passive negligence' rule, by which a defendant may be entitled to indemnity if his negligence was only 'passive' while another defendant's negligence was 'active.'" (citing *RTKL*, 80 Md. App. at 54-57, 559 A.2d at 810-11)), *aff'd*, 346 Md. 122, 695 A.2d 153 (1997).

479. *See Pennsylvania Threshermen & Farmers' Mut. Cas. Ins. Co. v. Travelers Ins. Co.*, 233 Md. 205, 215, 196 A.2d 76, 81 (1963).

negligence was active.⁴⁸⁰ As such, the passively negligent defendant-employer, whose liability was based on a legal relationship, was entitled to indemnity from the actively negligent defendant-employee.⁴⁸¹

Another example of a legal relationship justifying a claim for indemnity exists when a party is held liable solely by reason of vicarious liability resulting from the nondelegable nature of his duty to comply with the building code. *Council Co-Owners Atlantis Condominium, Inc. v. Whiting-Turner Contracting Co.*⁴⁸² involved a claim by a condominium owners association against the general contractor, developer, and architects of the building, alleging that, as a result of the defendants' negligence, the utility shafts and related electrical work were not installed or constructed in accordance with the plans and did not comply with the requirements of the applicable building code.⁴⁸³ Because the developer was liable solely by reason of vicarious liability resulting from the nondelegable nature of his duty to comply with the building code, he had a right to indemnity from the independent contractor he employed whose negligence actually caused the breach of the developer's duty.⁴⁸⁴ The court reached this conclusion by employing the active-passive negligence distinction, finding that the developer's negligence was merely passive, while that of the independent contractor was active.⁴⁸⁵

480. *Id.*

481. *Id.*

482. 308 Md. 18, 517 A.2d 336 (1986).

483. *Id.* at 22-23, 517 A.2d at 338-39.

484. *Id.* at 40-41, 517 A.2d at 348.

485. *Id.* A similar situation arose in *Gardenvillage Realty Corp. v. Russo*, 34 Md. App. 25, 366 A.2d 101 (1976). In *Russo*, the owner and the builder of a dwelling were seeking indemnity from the supplier of a concrete slab, used to form the base of the back porch, after the porch gave way and injured a tenant and her invitee. *Id.* at 27, 366 A.2d at 103. It was established that the concrete slab was in a defective condition because the metal reinforcing bars ran in the wrong direction. *Id.* at 29, 366 A.2d at 104. The improper placement of the reinforcing bars not only caused the porch to collapse, but it also violated the Baltimore City Building Code. *Id.* Under the Building Code, the owner and builder were liable for the injuries because they were a direct result of the violation. *See id.* at 33, 366 A.2d at 108 (explaining that liability attaches to the owner and permit holder if the violation of the code was a cause of injury). However, the Court of Special Appeals determined that the violation of the Building Code constituted merely passive negligence, while the negligence of the supplier was active, and permitted indemnity. *Id.* at 40, 366 A.2d at 111. Using the active-passive negligence distinction, the court concluded that the owner and builder were only constructively liable by reason of vicarious liability and had not been guilty of any independent negligence, while the supplier had been actively negligent in supplying the defective slab. *See id.* at 40-41, 366 A.2d at 111 (citing *Pennsylvania Thresherman & Farmers' Mut. Cas. Ins. Co. v. Travelers Ins. Co.*, 233 Md. 205, 196 A.2d 76 (1963); *Chesapeake & Ohio Canal Co. v. County Comm'rs*, 57 Md. 201 (1881)).

Thus, in Maryland, indemnity is clearly proper when a party held liable to a plaintiff in a tort action did not take a physical role in the negligent act that caused the plaintiff's injury, but was merely passively negligent and held liable because of a legal relationship. Such precedent has resulted in a requirement, articulated by some Maryland courts, that the joint tortfeasors have "some sort of relationship" prior to the tort that justified the claim for indemnity.⁴⁸⁶

Outside the realm of imputed and vicarious liabilities, the active-passive negligence distinction becomes difficult to apply. In *Pyramid Condominium Ass'n v. Morgan*,⁴⁸⁷ the United States District Court for the District of Maryland applied the active-passive negligence distinction to require indemnity despite the absence of a legal relationship between the parties. In *Pyramid*, indemnity was sought from banking lenders by an architect and engineer.⁴⁸⁸ The parties were among several defendants in a suit resulting from injuries to the "common elements"⁴⁸⁹ and to the air-conditioning system of a condominium building.⁴⁹⁰ Because the relationship between the parties did not clearly indicate that one defendant was liable through imputed or constructive liability, the district court examined the plaintiff's complaint against the defendant seeking indemnity to determine whether the defendant's negligence was active or passive.⁴⁹¹ The court determined that indemnity was precluded because the defendant seeking indemnity was "an indispensable party to and direct participant in, the construction of the Pyramid complex [the condominium] during at least some critical stages of the building project."⁴⁹² In denying indemnity, the *Pyramid* court weighed the participation of the joint tortfeasors. This "weighing" resulted in a denial of indemnity because

486. *Hartford Acc. & Indem. Co. v. Scarlett Harbor Assocs. Ltd. Partnership*, 109 Md. App. 217, 275, 674 A.2d 106, 134 (1995) (citing *Board of Trustees of Baltimore County Community Colleges v. RTKL Assocs., Inc.*, 80 Md. App. 45, 55, 559 A.2d 805, 810 (1989)), *aff'd*, 346 Md. 122, 695 A.2d 153 (1997).

487. 606 F. Supp. 592 (D. Md. 1985).

488. *Id.* at 594.

489. "Common elements" are those aspects of the condominium complex which are shared by all of the units. The alleged defects in the instant case included "flaking concrete, corrosion of reinforcing rods, roof leaks, settlement cracks, corrosion of windows and handrails, water damage due to excessive intrusion of water through exterior walls, and an air-conditioning system that was improperly designed and installed." *Id.* at 595.

490. *Id.* The plaintiff alleged that the injuries were caused by the negligence and other acts or omissions of the defendants and the defendants filed third-party complaints for indemnification and contribution. *Id.*

491. *See id.* at 596 (citing *Tesch v. United States*, 546 F. Supp. 526, 529 (E.D. Pa. 1982)).

492. *See id.* The defendant seeking indemnity participated in both the design and construction of the building and as a result had knowledge of the substandard and faulty construction. *Id.*

the role of the defendant was active rather than passive.⁴⁹³ Even though indemnity was denied, the consideration of the relative fault of the joint tortfeasors was significant because it signified a move away from the use of legal relationships as the basis for indemnity and toward an expanded concept of comparative fault by utilizing the active-passive negligence distinction.

The Court of Special Appeals addressed the *Pyramid* case in *Board of Trustees of Baltimore County Community Colleges v. RTKL Associates, Inc.*,⁴⁹⁴ expanding the approach used to make the active-passive negligence distinction when it is not evident from the relationship between the parties.⁴⁹⁵ After the Plaintiff filed the Complaint against the defendant (an architectural firm), the defendant filed cross-claims for indemnification against the general contractor and the subcontractor.⁴⁹⁶ In addition to examining the complaint, the court stated that "if it is clear from circumstances revealed in the complaint that liability would only arise from proof of active negligence, there is no basis for an indemnity claim."⁴⁹⁷ The complaint in the *Pyramid* case alleged breaches of duty which included active and passive negligence on the part of the defendant seeking indemnification.⁴⁹⁸ The court considered the evidence relating to the defendant and found that such evidence could result in a finding by the jury of passive negligence.⁴⁹⁹ The court explained that the allegation of negligent supervising could be viewed as passive negligence.⁵⁰⁰ This observation by the court indicates that tort indemnity was no longer limited to a party who has been held liable because of constructive liability stemming from a legal relationship. Yet the court did not make a conclusive determination of whether the negligence was active or passive, stating that "indemnity was not precluded nor mandated . . . as a matter of law."⁵⁰¹ This case is an example of the difficulty courts face, outside the realm of legal relationships, when determining the propriety of indemnity.

493. *Id.*

494. 80 Md. App. 45, 559 A.2d 805 (1989).

495. *Id.* at 56, 559 A.2d at 811.

496. *Id.* at 48, 559 A.2d at 806.

497. *Id.*

498. *See id.* The complaint alleged a breach of duty on the part of the defendant seeking indemnification in "negligently designing, approving and supervising . . .," and the court explained that supervising was of a passive character. *Id.* at 56-57, 559 A.2d at 811.

499. *Id.* at 56-57, 559 A.2d at 811.

500. *Id.*

501. *See id.* at 57, 559 A.2d at 811. Such a determination should be left to the jury, but in this case, the Court of Special Appeals reversed and remanded the case for a new trial because the jury failed to follow the instructions. *Id.* at 60, 559 A.2d at 813.

In *Hartford Accident & Indemnity Co. v. Scarlett Harbor Associates*,⁵⁰² the most recent Maryland case addressing tort indemnity among joint tortfeasors, the Court of Special Appeals examined the conduct that constituted the alleged wrong in the complaint, as well as the circumstances revealed in the complaint, to determine whether indemnity was proper.⁵⁰³ The case involved a suit brought by the council of the condominium unit owners against the developer and its present and former general partners and third-party claims filed by the defendant against two subcontractors.⁵⁰⁴ In determining whether indemnity was proper, the court considered whether the wrongs against the defendant seeking indemnity were passive compared to the other defendant's active misconduct.⁵⁰⁵ This inquiry was based on the "overriding concept [in tort indemnity] . . . that, when there is a great disparity in the degree of fault among the wrongdoers, liability may be shifted to the party primarily responsible for the loss."⁵⁰⁶

The *Hartford* case is significant in that the Court of Special Appeals's reliance on the active-passive distinction was based on an interpretation of Maryland's tort indemnity law. Without having objective guidelines to follow, the court made this comparison based purely on the court's interpretation rather than principled guidelines. It demonstrates the court's willingness to expand tort indemnity from the original confines of vicarious or constructive liability.

The most recent test advanced by a Maryland court to determine whether tort indemnity is proper before *Franklin* compared the negligence of the joint tortfeasors to determine who is primarily at fault.⁵⁰⁷ Yet, two lines of cases had evolved with one following the common-law rule of tort indemnity, limiting its application to situations in which the indemnitee is only constructively or vicariously liable, and the other line of cases indicating that tort indemnity could be permitted based on a great disparity in the degrees of negligence. Thus, after the *Hartford* decision, it became evident that the phrase "active-passive negligence" had come to embody two concepts: (1) indemnity based on vicarious or constructive liability; and (2) indemnity based on degrees of fault.

502. 109 Md. App. 217, 674 A.2d 106 (1995), *aff'd*, 346 Md. 122, 695 A.2d 153 (1996).

503. *Id.* at 278, 674 A.2d at 136 (citing *RTKL* as an example of a case where the court compared the negligence of the two tortfeasors). For further discussion of the *RTKL* cases, see *supra* notes 494-501 and accompanying text.

504. *Id.* at 229, 674 A.2d at 112.

505. *Id.* at 278-79, 674 A.2d at 136.

506. *Id.* at 277, 674 A.2d at 135.

507. *Id.*

3. *The Court's Reasoning.*—In *Franklin v. Morrison*, the Court of Appeals held that while indemnification based on degrees of negligence is not permitted, indemnity may be based on the active-passive negligence distinction, to the extent that indemnity based in the active-passive distinction means indemnity based on vicarious/constructive liability.⁵⁰⁸ In reaching this conclusion, the *Franklin* court presented a general overview of tort indemnity before rejecting the three arguments advanced by Franklin to support his claim for indemnity from Jiffy Lube.⁵⁰⁹ The court discredited Franklin's arguments that: (1) indemnity was proper under *Restatement* section 886B(2)(e); (2) he was entitled to indemnity under the active-passive negligence distinction; and (3) indemnity should be granted because Jiffy Lube's negligence was disproportionately greater than his own.⁵¹⁰ In support of its rejection of Franklin's three arguments for indemnity, the court construed Maryland precedent narrowly and limited the types of cases in which indemnity is proper.⁵¹¹ In order to detail the court's reasoning, Franklin's arguments will be addressed in turn.

a. *Franklin's Claim for Indemnity Under Restatement (Second) of Torts Section 886B(2)(e).*—The first argument addressed by the court was Franklin's contention that indemnity was proper under section 886B(2)(e) of the *Restatement (Second) of Torts*, which provides, in pertinent part, that indemnity should be granted where "[t]he indemnitor created a dangerous condition of land or chattels as a result of which [two persons] were liable to the third person, and the indemnitee innocently or negligently failed to discover the defect."⁵¹² Franklin claimed the *Restatement* rule entitled him to indemnity because Jiffy Lube created a dangerous condition of chattels⁵¹³ by failing to replace

508. *Franklin*, 350 Md. at 167-69, 711 A.2d at 189-90.

509. *Id.* at 153-56, 711 A.2d at 182-84. The court explained that the basis for indemnity between tortfeasors "is restitution, and the concept that one person is unjustly enriched at the expense of another when the other discharges liability that it should be his responsibility to pay." *Id.* at 154, 711 A.2d at 182 (quoting *RESTATEMENT (SECOND) OF TORTS* § 886B, cmt. c (1979)). It continued with a discussion of the expanded notion of tort indemnity that arose "'to include cases in which the indemnitee, while to some degree personally at fault, was much less culpable than the indemnitor.'" *Id.* at 154, 711 A.2d at 183 (quoting *Vertecs Corp. v. Reichhold Chems., Inc.*, 661 P.2d 619, 621 (Alaska 1983)).

510. *Id.* at 157-69, 711 A.2d at 184-90.

511. *Id.* at 156-60, 711 A.2d at 184-85; see *infra* notes 572-587 and accompanying text (analyzing the reasoning employed by the *Franklin* court in rejecting Franklin's claim for indemnity under a relative fault theory).

512. *Franklin*, 350 Md. at 158, 711 A.2d at 184 (internal quotation marks omitted) (quoting *RESTATEMENT (SECOND) OF TORTS* § 886B(2)(e)).

513. *Id.* *Restatement (Second) of Torts* § 886B(1) explains the general concept of the rule and provides that "[i]f two persons are liable in tort to a third person for the same harm

or by improperly replacing the differential check plug.⁵¹⁴ In support of this argument, Franklin cited defective brake cases from other jurisdictions in which the defendant had no knowledge or notice of the defective brakes and indemnity was granted against the third-party defendants responsible for the defects.⁵¹⁵ However, the *Franklin* court explained that the defective brake cases were irrelevant to the facts in *Franklin* because the plaintiff's theory of Franklin's liability was based on Franklin's conduct after he learned of the defect in his Blazer.⁵¹⁶ Unlike the defective brake cases, where the defendants had no notice or knowledge of the defects, Franklin became aware of the problems with his Blazer 2100 feet in advance of the place where his car stopped.⁵¹⁷ Because the theory of liability against Franklin was based on Franklin's conduct after learning of the problem with his Blazer, the court determined that the rule of *Restatement* section 886B(2)(e) did not support his claim for indemnity.⁵¹⁸ By rejecting Franklin's claim, the court limited the *Restatement* requirement that "the indemnitee innocently or negligently failed to discover the defect."⁵¹⁹ The

and one of them discharges the liability of both, he is entitled to indemnity from the other if the other would be unjustly enriched at his expense by the discharge of the liability." *RESTATEMENT (SECOND) OF TORTS* § 886B(1). *Restatement* section 886B(2) simply sets forth the "established applications" of the general principle of unjust enrichment set forth in subsection (1). See *RESTATEMENT (SECOND) OF TORTS* § 886B cmt. c.

514. *Franklin*, 350 at 148-49, 711 A.2d at 180; see *supra* notes 416-419 and accompanying text (explaining the defect in the Blazer's differential plug after its Jiffy Lube servicing).

515. See *Franklin*, 350 Md. at 158-59, 711 A.2d at 185 (discussing *Corso v. Maroney*, 293 N.Y.S.2d 863 (Sup. Ct. 1968) and *Lipsman v. Warren*, 188 N.Y.S.2d 426 (Sup. Ct. 1959), *aff'd as modified*, 199 N.Y.S.2d 761 (Sup. Ct. 1960)). The *Franklin* court noted that in these cases, the New York courts held that indemnity would be proper if the defendant had no knowledge or notice of the defective brakes, "but that, if the operator did have notice or knowledge of the defect, then both the operator and the mechanic would be actively negligent and there could be no indemnification." *Id.* at 159, 711 A.2d at 185.

516. See *id.* at 159-60, 711 A.2d at 185. The plaintiff focused on Franklin's actions in the 2100 feet between his discovery of the defect and the time the Blazer stopped in the middle of the road, arguing that Franklin was negligent in what he had done or failed to do while traveling that 2100 feet. *Id.* Specifically, the plaintiff highlighted Franklin's failure to flash his lights to warn oncoming cars that he was having trouble, as well as his failure to honk his horn or even use a turn signal to let somebody know that he wanted to get out of the lane he was in. *Id.*

517. *Id.* There were measures that Franklin could have taken to try to prevent the accident. Morrison argued:

Did he [Franklin] ever flash his lights to let cars that were going beside him know that he was having trouble with his car? No. Did he honk his horn to let cars know that there was something wrong with his car? No. Did he so much as even turn on a signal to let somebody somewhere know that he wants to get out of the lane he is in? No. He did not do any of that.

Id. at 160, 711 A.2d at 185.

518. *Id.*

519. *RESTATEMENT (SECOND) OF TORTS* § 886B(2)(e).

holding suggests that Maryland will only permit indemnity when the indemnitee innocently failed to discover the defect, but not in situations where the indemnitee negligently failed to discover the defect.⁵²⁰

b. Franklin's Claim for Indemnity Under the Active-Passive Negligence Distinction.—After recognizing that the instances listed in *Restatement* section 886(B)(2) are not the exclusive bases for tort indemnity,⁵²¹ the court examined Franklin's second argument for indemnity, which was based on the active-passive negligence distinction.⁵²² The court noted the rule "that one whose negligence has consisted of mere passive neglect may have indemnity from an active wrongdoer."⁵²³ In support of its finding that Franklin's negligence constituted active negligence, the court discussed cases involving motor vehicle accidents from other jurisdictions which held that negligent driving of a motor vehicle constitutes active negligence.⁵²⁴ The

520. The court's rejection of Franklin's claim for indemnity under *Restatement* § 886B(2)(e) illustrates a practice point for attorneys. If a plaintiff's theory for indemnity is based on what a defendant did or failed to do after learning of a defective condition in a chattel or property, it is unlikely that the defendant will be entitled to indemnity from a third party. *Franklin*, 350 Md. at 160, 711 A.2d at 185. The rationale underlying this principle is the recognition that the defendant's action or failure to perform particular actions most likely is a proximate cause of the injury. This rationale is in accordance with past statements by the Court of Appeals addressing proximate cause. For example, in *Bloom v. Good Humor Ice Cream Co.*, 179 Md. 384, 18 A.2d 592 (1941), the court explained that "[t]he negligent acts must continue through every event and occurrence, and itself be the natural and logical cause of the injury." *Id.* at 387, 18 A.2d at 593. Applying this language to the *Franklin* case, it becomes evident that Franklin's failure to take preventive measures while traveling 2100 feet to the site of the accident constituted a negligent act that was a natural and logical cause of the injury. As such, the court determined that Franklin's knowledge, although limited, was sufficient to preclude recovery under *Restatement* section 886B(2)(e) because he could have taken measures to prevent the accident. *Franklin*, 350 Md. at 159-60, 711 A.2d at 185. His failure to take such measures was a proximate cause of the injury and precluded recovery under the *Restatement* rule.

521. *Franklin*, 350 Md. at 160, 711 A.2d at 185.

522. *Id.*; see *supra* notes 477-491 and accompanying text (discussing the active-passive negligence distinction).

523. *Franklin*, 350 Md. at 160, 711 A.2d at 185 (internal quotation marks omitted) (quoting KEETON ET AL., *supra* note 413, § 51, at 343).

524. See *id.* at 161-62, 711 A.2d at 186-87. The court discussed a Missouri Supreme Court decision that barred indemnity because the court did "not believe that indemnity should be required as between joint tort-feasors involved in a two-car automobile collision on a highway because of supposedly different types or degrees of negligence." *Id.* at 161, 711 A.2d at 186 (internal quotation marks omitted) (quoting *Crouch v. Tourtelot*, 350 S.W.2d 799, 807 (Mo. 1961) (en banc) (quoting *State ex rel. Siegel v. McLaughlin*, 315 S.W.2d 499, 507-08 (Mo. Ct. App. 1958))). Additionally, the *Franklin* court referenced a Mississippi decision that rejected a claim for indemnification arising out of a motor vehicle accident between two trucks that caused the death of a child. *Id.* at 162, 711 A.2d at 186-87 (discussing *Hood v. Dealers Transp. Co.*, 472 F. Supp. 250 (N.D. Miss. 1979)). The Mississippi

facts of these cases were not compared to the facts in the case at hand, but were set forth to justify the jury's finding that Franklin and Jiffy Lube were concurrently negligent because Franklin's operation of his Blazer constituted active negligence.⁵²⁵

After establishing that Franklin's negligence was active, the court recited the general law in Maryland that "one who is guilty of active negligence cannot obtain tort indemnification."⁵²⁶ This general rule was applied to Franklin, causing the court to conclusively state that use of the active-passive negligence distinction indicated that Franklin's negligence was active, precluding tort indemnity.⁵²⁷

c. Franklin's Claim for Indemnity Under a Relative Fault Theory.—Finally, after determining that Franklin's negligence was active, the court examined Franklin's argument that he was entitled to indemnity because Jiffy Lube's negligence was disproportionately greater than that of Franklin.⁵²⁸ This argument was based on language contained in Maryland cases addressing the right to indemnity where "there is a considerable difference in the degree of fault among the wrongdoers."⁵²⁹

The *Franklin* court addressed each decision cited by Franklin in support of his argument that indemnity is proper when there is a great disproportion between the negligence of the two joint tortfeasors.⁵³⁰ However, the court dismissed the statements as nothing more than an introductory overview of the law.⁵³¹

court stated that the facts of the case involved "a classic joint tortfeasor situation" and indemnity was precluded. *Id.* (quoting *Hood*, 472 F. Supp. at 252).

525. *Id.* at 163, 711 A.2d at 187.

526. *See id.*

527. *Id.*

528. *Id.* at 164, 711 A.2d at 187-88. As the court pointed out, this argument was based on language in *Hartford Accident & Indemnity Co. v. Scarlett Harbor Associates Ltd. Partnership*, 109 Md. App. 217, 674 A.2d 106 (1995), *aff'd*, 346 Md. 122, 695 A.2d 153 (1997), and *Pyramid Condominium Ass'n v. Morgan*, 606 F. Supp. 592, 595 (D. Md. 1985). *See supra* notes 487-506 and accompanying text (discussing the *Hartford* and *Pyramid* cases). The *Franklin* court highlighted the specific language in *Hartford*, relied upon by Franklin, which stated that "[a] right to indemnification may lie, notwithstanding the parties' joint and several liability, when there is a considerable difference in the degree of fault among the wrongdoers." *Franklin*, 350 Md. at 164, 711 A.2d at 187 (quoting *Hartford*, 109 Md. App. at 277, 674 A.2d at 135). The court noted that Franklin also relied on the statement in *Pyramid* that indemnity lies "where the character of one tortfeasor's conduct is significantly different from that of another who is also liable for the same damages." *Id.* (quoting *Pyramid*, 606 F. Supp. at 595).

529. *Franklin*, 350 Md. at 164, 711 A.2d at 187 (quoting *Hartford*, 109 Md. App. at 277, 674 A.2d at 135).

530. *See id.* at 164-68, 711 A.2d at 187-89.

531. *See id.* at 164-65, 711 A.2d at 187-88.

The court spent more time addressing the case of *Baltimore & Ohio Railroad Co. v. County Commissioners*,⁵³² which expanded the rule of tort indemnity to include cases where the indemnitee, although to some degree personally at fault, was less culpable than the indemnitor.⁵³³ A distinction was drawn between the facts of *B&O Railroad*, where indemnity was permissible, and those of the *Franklin* case, where indemnity was not proper.⁵³⁴ Specifically, *B&O Railroad* involved a claim for indemnity by Howard County, which had been held liable for an accident occurring on a public highway based on its special duty and relationship as a municipality.⁵³⁵ The court contended that negligence of a municipality, based on a legal duty, did not proximately cause the accident, while the negligence of Franklin proximately caused the accident.⁵³⁶

In addition, the *Franklin* court overruled its statement in *B&O Railroad* that indemnity is proper unless there is "joint participation in the tort and the parties [are] in equal degree guilty in a case of [that] nature."⁵³⁷ The court argued that not only would such a rule go beyond Franklin's argument that indemnity could be based on "a great disparity in the degree of fault among the wrongdoers,"⁵³⁸ but that it would be inconsistent with Maryland law.⁵³⁹ As such, the *Franklin* court implied that the expanded coverage in *B&O Railroad* was intended to apply only to such special relationships and not to cases where joint tortfeasors have different degrees of personal fault.⁵⁴⁰

The court also determined that a rule which permitted indemnity unless there is joint participation in the tort and the parties are equally guilty was inconsistent with a tort system that does not recog-

532. 113 Md. 404, 77 A. 930 (1910), overruled by *Franklin*, 350 Md. at 167, 711 A.2d at 189; see *supra* notes 467-478 and accompanying text (discussing the *B&O Railroad* case and its role in the origins of tort indemnity in Maryland).

533. The court spent time on this case because it acknowledged that *B&O Railroad* is either "in conflict with, or enlarges, the rule stated in *Chesapeake & Ohio Canal Co. v. County Commissioners*, 57 Md. 201 (1881)" and faults the *B&O Railroad* court for not citing the latter case. *Franklin*, 350 Md. at 165, 711 A.2d at 188.

534. *Franklin*, 350 Md. at 165-67, 711 A.2d at 188-89.

535. *Id.* at 166-67, 711 A.2d at 188-89 (citing *B&O Railroad*, 113 Md. 404, 77 A. 930 (1910)).

536. *Id.*

537. See *id.* at 167, 711 A.2d at 189 (alterations in original) (quoting *B&O Railroad*, 113 Md. at 417, 77 A.2d at 933).

538. *Id.* (quoting *Hartford Acc. & Indem. Co. v. Scarlett Harbor Assocs. Ltd. Partnership*, 109 Md. App. 217, 277, 674 A.2d 106, 135, *aff'd*, 346 Md. 122, 595 A.2d 153 (1997)).

539. *Id.*

540. *Id.* (concluding that Franklin's liability to Morrison was not based on a special relationship or duty comparable to that of a municipality and a user of its streets).

nize comparative fault.⁵⁴¹ The *Franklin* court reasoned that there is not any substantial difference between “a rule allowing indemnification where there is non-equal negligence, and tort system of comparative fault.”⁵⁴² The similarity between these concepts lies in the fact that they both require the jury to make a determination of the relative fault of wrongdoers based on percentages.⁵⁴³

Furthermore, the court argued that a system of tort indemnity based on the relative fault of the tortfeasors would be inconsistent with the Uniform Contribution Among Tortfeasors Act, which has been adopted by Maryland.⁵⁴⁴ While a system of comparative fault concerns itself with relative degrees of fault between parties, the UCATA simply apportions liability among joint tortfeasors on a pro rata basis, regardless of their legal negligence and is not concerned with degrees of fault.⁵⁴⁵

Final support for the court’s rejection of a system of comparative fault for indemnification came from the failure of the Maryland legislature to adopt an optional section of the UCATA that addressed apportionment based on degrees of fault.⁵⁴⁶ By not adopting this provision, the *Franklin* court reasoned, the Maryland legislature did not intend loss-shifting to be accomplished by comparative negligence.⁵⁴⁷ As such, the court rejected Franklin’s claim for indemnity based on an argument that Jiffy Lube’s negligence was disproportionately greater than his own.⁵⁴⁸

541. *Id.*

542. *Id.*

543. *Id.* at 167-68, 711 A.2d at 189. The court noted that some states, in recognizing comparative fault, have held that total loss-shifting is inconsistent with the theory of comparative fault, and therefore no longer recognize tort indemnification. *Id.* (citing *Vertecs Corp. v. Reichhold Chems., Inc.*, 661 P.2d 619 (Alaska 1983); *Taggart v. State*, 119 Cal. Rptr. 696 (Ct. App. 1975); *Allison v. Shell Oil Co.*, 495 N.E.2d 496 (Ill. 1986); *Amrep Southwest, Inc. v. Shollenbarger Wood Treating, Inc.*, 893 P.2d 438 (N.M. 1995); *Owens v. Truckstops of Am.*, 915 S.W.2d 420 (Tenn. 1996); *Pachowitz v. Milwaukee & Suburban Transp. Corp.*, 202 N.W.2d 268 (Wis. 1972)).

544. *Id.* at 168, 711 A.2d at 189. See MD. CODE ANN., CTS. & JUD. PROC. §§ 3-1402 to -1409 (Supp. 1997) for the full text of Maryland’s UCATA.

545. *Franklin*, 350 Md. at 168, 711 A.2d at 189 (citing CTS. & JUD. PROC. §§ 3-1402 to -1405).

546. See *id.* (citing UNIF. CONTRIBUTION AMONG TORTFEASORS ACT § 2 (revised 1955), 9 U.L.A. 157-58 (1951)). The optional section provided that “If the evidence indicates that there is a disproportion of fault as among the tortfeasors, the court shall instruct the jury that if it finds the tortfeasors to have been negligent, they shall also fix their relative degrees of fault.” *Id.* (quoting UNIF. CONTRIBUTION AMONG TORTFEASORS ACT § 2).

547. *Id.*

548. *Id.* at 169, 711 A.2d at 190.

4. *Analysis.*—In *Franklin v. Morrison*, the Court of Appeals maintained Maryland's law permitting indemnity based on an active-passive negligence distinction, but held that there is no right to indemnity based on degrees of negligence.⁵⁴⁹ This holding is inherently confusing, for application of the active-passive negligence distinction necessarily relies upon a comparison of the negligence of the joint tortfeasors to determine who is primarily at fault and therefore actively negligent. By prohibiting indemnity based on the relative fault of joint tortfeasors, the Court of Appeals established confusing precedent for lower courts because it is difficult to employ the active-passive negligence distinction without comparing the negligence of the two wrongdoers.

Concededly, the court's holding does clearly indicate that the circumstances in which indemnity is proper are very limited,⁵⁵⁰ and careful examination of the court's opinion, authored by Judge Rodowsky, suggests that Maryland's tort indemnity law cannot be employed outside the realm of purely imputed and vicarious liabilities.⁵⁵¹ As such, the Court of Appeals should have abandoned the active-passive negligence distinction entirely, and articulated the possible relationships in which indemnity is proper. Although a more concise statement of Maryland's law of tort indemnity would have created better policy, the *Franklin* court implied that in the absence of imputed or constructive liability resulting from a special relationship, there is no right to tort indemnity absent a contract.

a. *General Principles Underlying Indemnity.*—Indemnification is designed to shift the entire cost of the tortious conduct to one defendant who is primarily responsible.⁵⁵² A right to indemnity may arise by express agreement or by implication.⁵⁵³ In the absence of an express agreement, tort indemnity should be strictly applied because the indemnitor becomes one hundred percent liable for the loss while the indemnitee has no liability at all. The *Franklin* court brought an end to the expansion of tort indemnity from which the active-passive negligence distinction had evolved. The difficulty of applying the ac-

549. *Id.* at 168-69, 711 A.2d at 190.

550. *See id.* at 160-61, 711 A.2d at 185-86 (discussing the general limit on the concept of passive negligence which restricts application of the label to situations where a party is solely vicariously or constructively liable).

551. *Id.* For further discussion on situations in which indemnity may be proper, see *infra* notes 591-616 and accompanying text.

552. *Id.* at 153, 711 A.2d at 182 (stating that "[b]y seeking indemnity . . . Franklin seeks to have 100% of the loss borne by Jiffy Lube").

553. *Hanscome v. Perry*, 75 Md. App. 605, 615, 542 A.2d 421, 426 (1988).

tive-passive distinction has resulted in indemnity reaching beyond the scope desired by the Court of Appeals and beyond the scope of what is equitable. The *Franklin* court prevented further expansion of tort indemnity under Maryland law by limiting its application to constructive or imputed liability.⁵⁵⁴

b. Analysis of the Franklin Court's Reasoning.—

(1) *Franklin's Claim for Indemnity Under the Active-Passive Distinction.*—The rationale underlying the court's rejection of Franklin's claim for indemnity under the active-passive distinction⁵⁵⁵ is not as convincing as that used to reject Franklin's claim under the *Restatement* rule. The court relied on cases involving car accidents from other jurisdictions⁵⁵⁶ to illustrate that Franklin's negligence arising out of the operation of his automobile was "active" negligence as a matter of law.⁵⁵⁷ By drawing this conclusion, the court implied that negligence resulting from the act of operating a motor vehicle will always constitute active negligence, without much inquiry into the specific facts of the case.

The facts of the *Franklin* case, however, differ from the facts of the cases cited by the court. Specifically, in each of the automobile collision cases cited by the *Franklin* court in its analysis of the active-passive negligence distinction,⁵⁵⁸ the tortfeasors did not have any legal relation to one another and both the indemnitee and indemnitor were involved in the accident in which the injury occurred.⁵⁵⁹ These facts can be distinguished from those in the *Franklin* case where Franklin and Jiffy Lube did not have a relationship prior to the accident, and Franklin was the only party involved in the accident. Specifically, Franklin took his car to Jiffy Lube for a routine service and Jiffy Lube's negligence, in failing to replace the differential plug, created and initiated the sequence of events giving rise to the accident.⁵⁶⁰ Franklin had to deal with the Blazer's mechanical failure, which was foisted upon him by faulty repair work. Yet, in reaching its conclu-

554. *Franklin*, 350 Md. at 154-56, 711 A.2d at 183-84.

555. See *supra* notes 521-527 and accompanying text (explaining the reasoning underlying the *Franklin* court's decision to reject Franklin's claim for indemnity under the active/passive negligence distinction).

556. See *supra* notes 524-525 and accompanying text.

557. *Franklin*, 350 Md. at 163, 711 A.2d at 187.

558. *Id.* at 161-63, 711 A.2d at 186-87 (citing *Crouch v. Tourtelot*, 350 S.W.2d 799 (Mo. 1961) (en banc); *Hood v. Dealers Transp. Co.*, 472 F. Supp. 250 (N.D. Miss. 1979)).

559. *Id.*

560. *Id.* at 147, 711 A.2d at 179. For a discussion of Franklin's relationship with Jiffy Lube prior to the accident, see *supra* notes 416-419 and accompanying text.

sion, the court did not even inquire into the negligence of Jiffy Lube, nor did the court compare Franklin's negligence to that of Jiffy Lube.⁵⁶¹ Rather, it examined Franklin's actions independently, indicating that in employing the active-passive distinction, the alleged negligence of each party is to be analyzed separately.⁵⁶²

Additionally, the court explained that in all cases involving the active-passive distinction, the distinction:

rests upon a fault that is imputed or constructive only, being based on some legal relation between the parties, or arising from some positive rule of common or statutory law, or because of a failure to discover or correct a defect or remedy a dangerous condition caused by the act of the one primarily responsible.⁵⁶³

However, the court relied on selective case law to draw this conclusion,⁵⁶⁴ and ignored past cases which had suggested that there is no such limitation on tort indemnity.⁵⁶⁵ The cases relied upon by the *Franklin* court were primarily those which had reinforced the common law rule enforcing tort indemnity in cases in which the indemnitee is only constructively or vicariously liable for the acts of the indemnitor.⁵⁶⁶ For example, the court briefly mentioned, but did not analyze, the language in the *Hartford* case⁵⁶⁷ which stated "[A] right to indemnification may lie, notwithstanding the parties' joint and several liability, when there is a considerable difference in the degree of fault among the wrongdoers."⁵⁶⁸ The court's selective reading of precedent created a new standard for tort indemnity in Maryland, which is limited to the realm of implied or constructive liability, even though the court failed to address cases involving the expanded notion of tort indemnity.

Because the court found that the *Franklin* case did not present a claim for indemnity based on a legal relationship, Franklin's negli-

561. *Franklin*, 350 Md. at 160-64, 711 A.2d at 185-87.

562. *Id.* at 163, 711 A.2d at 187. The court concluded that "[u]nder the active-passive analysis, Franklin's negligence is active, and accordingly, tort indemnification is not available to him." *Id.* No reference was even made to Jiffy Lube's negligence.

563. *See id.* at 161-62, 711 A.2d at 186 (quoting *Tourtlot*, 350 S.W.2d at 805 (quoting *State ex rel. Siegel v. McLaughlin*, 315 S.W.2d 499, 507-08 (Mo. Ct. App. 1958))).

564. *See id.* at 163-64, 711 A.2d at 187 (discussing the active-passive distinction under Maryland law).

565. *See supra* notes 487-490.

566. *See supra* notes 481-487.

567. *See supra* notes 504-508.

568. *Hartford Accident & Indem. Co. v. Scarlett Harbor Assocs. Ltd. Partnership*, 109 Md. App. 217, 277, 674 A.2d 106, 135 (1996), *aff'd*, 346 Md. 122, 685 A.2d 153 (1997).

gence was active and there was no right to indemnity.⁵⁶⁹ The court found that Franklin's active negligence precluded indemnity, without even inquiring into whether Jiffy Lube was more negligent than Franklin.⁵⁷⁰ Such an inquiry indicates that when determining whether tort indemnity is proper, a court should examine the relative negligence of a party seeking indemnity individually, without regard to the negligence of the other party.⁵⁷¹ If a party's liability is based on a special legal relationship, it will be entitled to indemnity from the party whose personal fault stems from active participation in the action giving rise to the injury.

(2) *Franklin's Claim for Indemnity Under a Relative Fault Theory.*—The *Franklin* court rejected Franklin's claim for indemnity based on the great disparity between his negligence and that of Jiffy Lube by explaining that Maryland no longer recognizes the right to indemnity based on the relative negligence of the parties.⁵⁷² Although Franklin advanced this argument as part of the active-passive distinction argument, the court examined it separately.⁵⁷³ This separation ignored the reality that employment of the active-passive distinction required a comparison of the negligence of the joint tortfeasors.⁵⁷⁴ In employing the active-passive analysis in the past, Maryland courts have examined the relative negligence of the parties to determine who is primarily negligent.⁵⁷⁵ While some Maryland cases have examined the relative negligence of the parties,⁵⁷⁶ others looked only to whether the indemnitee's liability was constructive or imputed to determine whether his negligence was active-passive.⁵⁷⁷ Without inquiring into the relative negligence of the parties, the *Franklin* court narrows Mary-

569. *Franklin*, 350 Md. at 163, 711 A.2d at 187.

570. *Id.*

571. *Id.*

572. *Id.* at 167-68, 711 A.2d at 189; see *supra* notes 459-509 and accompanying text (discussing the origins of tort indemnity in Maryland based on degrees of negligence).

573. *Franklin*, 350 Md. at 164-69, 711 A.2d at 187-90.

574. See Brief for Petitioner at 14-18, *Franklin v. Morrison*, 350 Md. 144, 711 A.2d 177 (1998) (No. 84) (explaining that the active-passive distinction necessarily relies on a comparison of the relative negligence of the tortfeasors).

575. See *supra* notes 476-506 (explaining how Maryland courts have employed the active-passive analysis).

576. See, e.g., *Baltimore & Ohio R.R. Co. v. County Comm'rs*, 113 Md. 404, 711 A. 930 (1910), *overruled by Franklin*, 350 Md. at 167, 711 A.2d at 189; *Hartford Acc. & Indem. Co. v. Scarlett Harbor Assocs. Ltd. Partnership*, 109 Md. App. 217, 674 A.2d 106 (1996), *aff'd*, 346 Md. 122, 685 A.2d 153 (1997); *Board of Trustees of Baltimore County Community Colleges v. RTKL Assocs., Inc.*, 80 Md. App. 45, 56, 559 A.2d 805, 811 (1989). For a detailed discussion of these cases, see the Legal Background section of this Note.

577. See e.g. *Pennsylvania Thresherman & Farmers' Mut. Cas. Ins. Co. v. Travelers Ins. Co.*, 233 Md. 205, 196 A.2d 76, 81 (1963); *Council of Co-Owners Atlantis Condominium*,

land's tort indemnity law by limiting its application to cases where a party's liability, when examined individually, is based on a constructive or imputed liability.⁵⁷⁸

The court found ample support for rejecting indemnity based on the relative degrees of fault between joint tortfeasors because of the limited purpose the expanded notion of tort indemnity was originally intended to serve, primarily to weaken the harshness of the *Merryweather* rule.⁵⁷⁹ Yet, it never addressed Maryland precedent, including this comparison, outside the realm of constructive or imputed liability. An examination of the negligence of each tortfeasor independently will usually result in a finding of active, rather than passive, negligence in the absence of some special relationship between the parties. This is the likely outcome in such situations because the causation element of negligence requires a finding that the liable party did something to proximately cause the injury. Any joint tortfeasor who participates in an action giving rise to an injury, no matter how minor the role, will be barred from indemnity from the other tortfeasor who is primarily responsible.

The *Franklin* decision returned Maryland's tort indemnity law to common law principles by basically eliminating indemnity based on degrees of fault. While the court did not provide substantial reasoning for this shift in the law, the decision was perhaps based on the recognition that there is no longer a need for tort indemnity based on degrees of negligence because of the relief available through the Uniform Contribution Among Tortfeasors Act.⁵⁸⁰ Because both the Act and the expanded notion of tort indemnity were designed to weaken the harshness of the rule that there is no right of contribution between joint tortfeasors, it is not necessary to maintain both laws. The guidelines set forth in the Act, which provide for contribution based on a pro rata basis, are not difficult to apply in practice. The law of tort indemnity based on degrees of negligence, on the other hand, does not have any concrete guidelines to follow and lacks consistency. The court did not raise this rationale in its opinion and, instead, provided an unconvincing argument to support its return to the common law.

Inc. v. Whiting-Turner Contracting Co., 308 Md. 18, 517 A.2d 336 (1986); *Gardenvillage Realty Corp. v. Russo*, 34 Md. App. 25, 366 A.2d 101 (1976).

578. *Franklin*, 350 Md. at 163, 711 A.2d at 187.

579. See *supra* notes 451-454 and accompanying text.

580. For a more detailed discussion of Maryland's Uniform Contribution Among Tortfeasors Act, see *supra* note 458.

One such example is the court's unconvincing reasoning that indemnity based on degrees of negligence should not be permitted because it is substantially similar to a tort system of comparative fault, which is not recognized in Maryland.⁵⁸¹ A tort system of comparative fault compares the contributory negligence of the plaintiff to the negligence of the defendant and apportions liability accordingly.⁵⁸² Under a comparative fault system, negligence is measured in terms of percentages and any damages awarded against the defendant are diminished in proportion to the amount of negligence attributable to the person seeking recovery.⁵⁸³ Tort indemnity based on the degrees of negligence, in contrast, examines the relative fault of the defendants.⁵⁸⁴ The *Franklin* court did not even recognize the difference between a system of comparative fault and tort indemnity based on degrees of negligence; their failure to do so weakened the argument.⁵⁸⁵ Apparently, the court did not deem the parties involved in the comparison as controlling. Rather, the fact that both systems require the jury to make a determination of the relative fault of the wrongdoers based on percentages was a sufficient similarity for the court.⁵⁸⁶

A stronger argument advanced by the court was that which looked to the Maryland legislature's rejection of the optional provision of the 1939 UCATA, which addressed apportionment of liability based on degrees.⁵⁸⁷ This history demonstrates that the *Franklin* court's holding is consistent with the intent of the legislature. The court implies that the decision of the Maryland legislature to reject the optional section expressly indicates its intention to denounce a system of tort indemnity based on degrees of negligence. Yet, while the legislature's rejection of a system of contribution based on degrees of negligence indicates that the legislature disapproves of the notion

581. *Franklin*, 350 Md. at 167-68, 711 A.2d at 189.

582. See *Harrison v. Montgomery County Bd. of Educ.*, 295 Md. 442, 452-53, 456 A.2d 894, 898-99 (1983) (discussing the principles underlying comparative negligence before rejecting its adoption in Maryland).

583. BLACK'S LAW DICTIONARY, *supra* note 446, at 282.

584. See *supra* 467-478 and accompanying text.

585. See *Franklin*, 350 Md. at 167, 711 A.2d at 189 ("We do not discern any substantial difference between *Franklin's* position, or a rule allowing indemnification where there is non-equal negligence, and a tort system of comparative fault.").

586. *Id.* at 168, 711 A.2d at 189; see *supra* notes 540-542 and accompanying text (discussing the similarities between a system of comparative fault and tort indemnity based on degrees of negligence).

587. *Franklin*, 350 Md. at 168, 711 A.2d at 189; see *supra* note 458 (examining Maryland's rejection of the optional section of the UCATA which examined the relative degrees of fault of joint tortfeasors when determining whether contribution is proper in determining the amount of contribution required from each party).

of loss shifting based on relative degrees of fault, it does not necessarily constitute a direct attack on tort indemnity based on a great disparity in negligence. Nevertheless, the court argues that by rejecting indemnity based on degrees of negligence, the *Franklin* court placed Maryland law in accordance with the original intent of the legislature, limiting the application of tort indemnity to the special circumstances to which it was intended to apply, primarily to situations involving imputed or constructive liability.

c. Special Circumstances in Which Indemnity Is Clearly Proper Under Maryland Law.—The circumstances under which an implied right of indemnity is now recognized by Maryland law are rather limited. There are few situations in which the right to indemnity is likely to be proper. The *Franklin* court provided some examples, based on *Restatement (Second) of Torts* section 886B(1), when indemnity is proper based on some relationship between the joint tortfeasors prior to the wrongful act.⁵⁸⁸ Such examples were the clearest indication of the court's policy that the right to indemnity is extremely limited.⁵⁸⁹ All of the relationships set forth by the court involve legal duties which may result in the imposition of constructive liability without personal fault or involvement in the action giving rise to the injury.⁵⁹⁰

The court, in accordance with *Restatement (Second) of Torts* section 886B(2), provided the instances in which indemnity should be granted.⁵⁹¹ *Restatement (Second) of Torts* section 886B(2)(a) provides that indemnity should be granted when "[t]he indemnitee was liable only vicariously for the conduct of the indemnitor."⁵⁹² As an example of a situation that would fulfill the requirements of this subsection, the *Franklin* court cited a Maryland case involving a claim against an employer based on the doctrine of *respondeat superior*.⁵⁹³ Because an employer may be held liable for the active negligence of his employees, an employer would have a right to indemnity against the employee for damages suffered by him.⁵⁹⁴ As such, the *Franklin* court

588. *Franklin*, 350 Md. at 156-59, 711 A.2d at 183-85 (citing RESTATEMENT (SECOND) OF TORTS § 886B(1) (1979)).

589. *Id.*; see *infra* notes 591-616 (explaining relationships involving imputed or constructive liability which may entitle a party to tort indemnity).

590. *Franklin*, 350 Md. at 156-59, 711 A.2d at 183-85.

591. *Id.* at 156-58, 711 A.2d at 183-84 (quoting RESTATEMENT (SECOND) OF TORTS § 886B(2)).

592. *Id.* at 157, 711 A.2d at 184 (quoting RESTATEMENT (SECOND) OF TORTS § 886B(2)(a)).

593. *Id.* n.4 (citing *Pennsylvania Threshermen & Farmers' Mut. Cas. Ins. Co. v. Travelers Ins. Co.*, 233 Md. 205, 196 A.2d 76 (1963)).

594. *Id.*

makes it clear that indemnity may be proper in situations involving a special relationship such as that of an employer and his employee.⁵⁹⁵

Another special relationship in which indemnity may be granted is where “[t]he indemnitee acted pursuant to directions of the indemnitor and reasonably believed the directions to be lawful.”⁵⁹⁶ A prime example of such a relationship, as provided by the *Franklin* court, is that of an agent acting pursuant to the authority of the person from whom he seeks to recover, without any knowledge or intention on the part of the agent to violate the law.⁵⁹⁷ Thus, the legal relationship between an agent and principal may entitle an agent to indemnity if he is held liable for damages caused by his actions which were in response to the directions of his principal.⁵⁹⁸

The relationship between an employer and employee, and that between an agent and principal, are not the only relationships that may entitle one to indemnity. Another example of such a relationship arises when “[t]he indemnitee was induced to act by a misrepresentation on the part of the indemnitor, upon which he justifiably relied.”⁵⁹⁹ The *Franklin* court gives the example of a case involving a shipper’s preparation and request to a railroad to issue bills of lading to separate consignees for the same shipment.⁶⁰⁰ The railroad was entitled to indemnity from the shipper for loss incurred after it had justifiably relied on the shipper’s misrepresentation.⁶⁰¹ This example suggests that parties engaging in business have a unique relationship which may justify indemnity in certain circumstances.

Furthermore, if “[t]he indemnitor supplied a defective chattel or performed defective work upon land or buildings as a result of which

595. For example, if an employer is held liable for damages resulting from a car accident caused by his employee’s negligent driving, the employer is entitled to indemnity from his employee. See, e.g., *Pennsylvania Thresherman*, 233 Md. 205, 196 A.2d 76.

596. *Franklin*, 350 Md. at 157, 711 A.2d at 184 (quoting RESTATEMENT (SECOND) OF TORTS § 886B(2)(b)).

597. See *id.* n.5 (citing *Percy v. Clary*, 32 Md. 245, 250 (1870)). The court cites *Percy*, for the doctrine that indemnity may be proper when two conditions have been met: “first, that the wrong must not be *malum in se*; and second, that the party claiming contribution must have acted without any design to violate the law, and as the agent or by the authority of him from whom he seeks to recover.” *Id.* (quoting *Percy*, 32 Md. at 250).

598. For example, if a principal provides false information to an agent and the agent, believing the information to be true, acts on the information, the agent is entitled to indemnity from the principal if he is held liable for an injury resulting from the false information.

599. *Franklin*, 350 Md. at 157, 711 A.2d at 184 (citing RESTATEMENT (SECOND) OF TORTS § 886B(2)(c)).

600. *Id.* n.6 (citing *Philadelphia, Baltimore & Washington R.R. Co. v. Roberts*, 134 Md. 398, 106 A. 615 (1919)).

601. *Id.* at 157, 711 A.2d at 184 (citing *Roberts*, 134 Md. 398, 106 A. 615).

both were liable to the third person, and the indemnitee innocently or negligently failed to discover the defect,"⁶⁰² indemnity may be granted. The relationship between an independent contractor and a real estate developer falls within this category, and indemnity will be proper where the developer is held constructively liable for the actual negligence of the independent contractor.⁶⁰³ The *Franklin* court also cites a case in which a landlord was entitled to indemnity from the manufacturer of a concrete slab that collapsed and injured tenants because it did not conform to the building code requirement.⁶⁰⁴ Indemnity was proper in that case because the landlord was only constructively liable for the actual negligence of the manufacturer who defectively built the concrete slab.⁶⁰⁵

These examples illustrate that indemnity is available to a party who has not taken a physical role in the negligent act, but is legally negligent because of some sort of relationship prior to the tort. This rule seems to adequately address the injustice at which tort indemnity was originally aimed. Specifically, it was aimed at weakening the harshness of the common law rule that there is no right to contribution among joint tortfeasors.⁶⁰⁶ It is equitable to permit tort indemnity in cases where a party, without personal fault, is held liable. Because indemnity shifts the total cost of damages to one party, it is only fair that it is applied sparingly, and limiting its application to cases involving constructive or derivative liability is reasonable. Maryland law now properly limits the availability of tort indemnity to persons whose liability is constructive or imputed.

Indemnity may also be granted where "[t]he indemnitor created a dangerous condition of land or chattels as a result of which both were liable to the third person, and the indemnitee innocently and negligently failed to discover the defect."⁶⁰⁷ This seems to be the broadest category of legal relationship because it may include several types of circumstances. The court cites the example provided by the

602. *Id.* (quoting RESTATEMENT (SECOND) OF TORTS § 886B(2)(d)).

603. *Id.* n.7 (citing Council of Co-Owners Atlantis Condominium, Inc. v. Whiting-Turner Contracting Co., 308 Md. 18, 40-41, 517 A.2d 336, 348 (1986)). The court noted that the nondelegable duty on the part of the real estate developer for violations of safety measures in a building code entitles the developer to indemnity from the independent contractor whose negligence actually caused the breach.

604. *Id.* (citing Gardenvillage Realty Corp. v. Russo, 34 Md. App. 25, 366 A.2d 101 (1976)).

605. *Id.*

606. See *supra* notes 451-454 and accompanying text.

607. *Franklin*, 350 Md. at 158, 711 A.2d at 184 (quoting RESTATEMENT (SECOND) OF TORTS § 886B(2)(e)).

Restatement,⁶⁰⁸ and discussed this particular situation⁶⁰⁹ when it addressed Franklin's claim for indemnity under *Restatement* section 886B(2)(e).⁶¹⁰ Specific emphasis is placed on the lack of knowledge of the indemnitee about the defective condition created by the indemnitor.⁶¹¹ This discussion suggests that if the two parties have some sort of relationship prior to the tort, and the indemnitor creates a dangerous condition about which the indemnitee has no knowledge or notice, the indemnitee can recover because he has not directly contributed to the injury.⁶¹²

Finally, indemnity is proper where "[t]he indemnitor was under a duty to the indemnitee to protect him against the liability to the third person."⁶¹³ The facts surrounding the first Maryland case to expand tort indemnity to joint tortfeasors illustrate this situation.⁶¹⁴ The *Chesapeake* case involved a county's claim for indemnity from a canal company, which had created and should have repaired a defective condition on the bridge that injured third parties.⁶¹⁵ Indemnity should be granted in such situations because municipal corporations are held constructively liable to injuries incurred in their county because of the particular nondelegable duty owed by a county, and they should receive indemnity from those who actually caused the defective condition that resulted in injury.⁶¹⁶

608. *Id.* n.8 (quoting RESTATEMENT (SECOND) OF TORTS § 886B, cmt. i). The *Restatement* gives the example of an indemnitor who wrongfully dug a ditch across the indemnitee's road or had left a dangerous obstruction in front of the indemnitee's home. *Id.* (quoting RESTATEMENT (SECOND) OF TORTS § 886B, cmt. i).

609. The *Restatement* situation quoted by the *Franklin* court involved a case where "The indemnitor created a dangerous condition on land or chattels as a result of which both were liable to the third person, and the indemnitee innocently or negligently failed to discover the defect." *Id.*

610. *Id.* at 158, 711 A.2d at 184.

611. *Id.* at 159-60, 711 A.2d at 185. The court contrasts Franklin's failure to do anything while the Blazer was traveling 2100 feet to the place where it stopped with the facts in the defective brake cases cited by Franklin in support of his argument that he was entitled to indemnity under *Restatement* section 886(B)(2)(e), where the operators had no knowledge or notice of the defect. *Id.*; see also *supra* notes 515-516 and accompanying text (discussing New York cases involving car accidents resulting from faulty mechanical repairs).

612. *Franklin*, 350 Md. at 159-60, 711 A.2d at 185. It is interesting to note that the *Franklin* court cited no Maryland precedent applying this *Restatement* subsection in its opinion.

613. *Id.* at 158, 711 A.2d at 184 (citing RESTATEMENT (SECOND) OF TORTS § 886B(2)(f)).

614. See *supra* notes 467-473 and accompanying text for a discussion of the *B&O Railroad* case and the origins of tort indemnity in Maryland.

615. See *Franklin*, 350 Md. at 154, 711 A.2d at 182 (discussing *Chesapeake & Ohio Canal Co. v. County Comm'rs*, 57 Md. 201, 220-24 (1881)).

616. *Id.*

d. *When the Active-Passive Distinction Applies.*—After providing these specific instances in which indemnity is proper, the *Franklin* court acknowledged that they are not exclusive.⁶¹⁷ Yet, this statement may be misleading, for the *Franklin* court does not provide any additional circumstances where indemnity would be proper.⁶¹⁸ Rather, the court reiterated the relationships previously listed and merely implied the actions of the permissible indemnitee as passive and those of the proper indemnitor as active.⁶¹⁹ Merely reiterating the relationships provided in the *Restatement*, rather than explaining the role of the active-passive negligence distinction in Maryland's tort indemnity law, creates a confusing opinion.

Under the active-passive negligence distinction, only a passively negligent tortfeasor is entitled to indemnity.⁶²⁰ The court indicated that there is a "general limit on the concept of passive negligence,"⁶²¹ because it is equitable only in rare circumstances that the entire loss be shifted to one tortfeasor. According to the *Franklin* opinion, tort indemnity is available to avoid unjust enrichment.⁶²² As such, it is only proper when a fault is "imputed or constructive only, being based on some legal relation between parties, or arising from some positive rule of common or statutory law or because of a failure to discover or correct a defect or remedy a dangerous condition caused by the act of the one primarily responsible."⁶²³ Such imputed or constructive liability is what the court labels "passive negligence."⁶²⁴

The *Franklin* court could have easily abandoned the active-passive negligence distinction and labeled the additional circumstances in which indemnity is proper as those in where a person without personal fault is held liable. The Court of Special Appeals has expressed such a sentiment when it stated that the right to tort indemnity is "articulated most succinctly in the *Restatement of Restitution* § 96."⁶²⁵ Section 96 of the *Restatement of Restitution* provides, in pertinent part, that "[a] person who, without personal fault, has become subject to tort

617. See *id.* at 160, 711 A.2d at 185 ("The instances listed in Restatement § 886B, in which indemnification is generally recognized as available, are not exclusive.").

618. *Id.* at 156-59, 711 A.2d at 183-84.

619. *Id.*

620. *Id.* at 160, 711 A.2d at 185-86.

621. *Id.*, 711 A.2d at 185.

622. *Id.*

623. *Id.* at 161-62, 711 A.2d at 186 (quoting *Crouch v. Tourtelot*, 350 S.W.2d 799, 805 (Mo. 1961) (en banc) (quoting *State ex rel. Siegel v. McLaughlin*, 315 S.W.2d 499, 507-08 (Mo. Ct. App. 1958))).

624. See *id.* at 165-68, 711 A.2d at 188-90.

625. See *Hanscome v. Perry*, 75 Md. App. 605, 617, 542 A.2d 421, 427 (1988) (quoting RESTATEMENT OF RESTITUTION § 96 (1937)).

liability for the unauthorized and wrongful conduct of another, is entitled to indemnity from the other for expenditures properly made in the discharge of such liability.”⁶²⁶

The *Franklin* court should have adopted a phrase like “without personal fault” to indicate the situations in which a person may be entitled to indemnity. The circumstances in which indemnity is proper, as highlighted by the court, indicate that indemnity is proper when a defendant is held liable even though he did nothing to cause the plaintiff’s injuries.⁶²⁷ In such circumstances, the defendant entitled to indemnity has not done anything to proximately cause the injuries.⁶²⁸

Yet the active-passive negligence distinction connotes that some negligent acts may be less of a proximate cause of the injuries and therefore passively negligent, while other acts are a more direct proximate cause and hence actively negligent. Employment of the active-passive negligence distinction requires a weighing of the relative fault of tortfeasors, but the *Franklin* court has rejected indemnity based on such a comparison.⁶²⁹ As such, the court’s maintenance of the active-passive negligence distinction is inconsistent with its rejection of indemnity based on degrees of negligence.

e. Maryland’s Indemnity Law After Franklin.—By discarding indemnity based on degrees of negligence, the *Franklin* court implies that indemnity can only be applied where the liability of the indemnitee is solely constructive or derivative.⁶³⁰ Such constructive liability must be what the court considers “passive negligence.”⁶³¹ However, rather than placing such a label on the specific situations, the court would have provided better direction and stronger precedent if it had abandoned the active-passive negligence distinction as well. Such terminology is misleading because it denotes degrees of fault, and the court has specifically rejected indemnity based on degrees of fault.⁶³² The confusion caused by using such labels could have been avoided if the court simply stated that the active-passive negligence distinction

626. RESTATEMENT OF RESTITUTION § 96.

627. *Franklin*, 350 Md. at 156-59, 711 A.2d at 183-85; see *supra* notes 588-616 (discussing relationships that may entitle a party to indemnity).

628. *Franklin*, 350 Md. at 156-59, 711 A.2d at 183-85.

629. *Id.* at 167-68, 711 A.2d at 189-90.

630. See *supra* notes 591-611 (discussing relationships advanced by the *Franklin* court as examples of cases when indemnity may be proper).

631. *Franklin*, 350 Md. at 163, 711 A.2d at 187.

632. *Hanscome v. Perry*, 75 Md. App. 605, 618 n.3, 542 A.2d 421, 427 (1988) (citing *Houdaille Indus., Inc. v. Edwards*, 374 So. 2d 490, 493 (Fla. 1979)).

distinguishes one who is at fault from one who is free from fault. For these reasons, the *Franklin* court should have suggested the situations where indemnity is proper and emphasized the fact that each situation involves liability without personal fault. Furthermore, the court should have expressly stated that tort indemnity is limited to the realm of constructive and derivative liability.⁶³³

5. *Conclusion.*—In *Franklin v. Morrison*, the Court of Appeals limited the availability of tort indemnity by abandoning the rule permitting indemnity or contribution based on degrees of negligence.⁶³⁴ Although the court maintained Maryland's rule permitting indemnity based on the active-passive negligence distinction, it indicated that the label "passive negligence" will sparingly be applied.⁶³⁵ Tort indemnity will be proper primarily in cases where a person is constructively or vicariously liable as the result of a legal relationship, but who is without personal fault.⁶³⁶ The court was correct in limiting tort indemnity to situations where liability is constructive or derivative because such the entire loss should not be shifted to a "more" negligent party when the parties are, in fact, joint tortfeasors. The Uniform Contribution Among Tortfeasors Act addresses the proper distribution of liability in such cases. Yet, even though the *Franklin* court's abandonment of indemnity based on degrees of negligence is commendable, by maintaining the active-passive distinction, confusion will result. Confusion will result because the distinction has come to embody two meanings: (1) situations where the indemnitee is only vicariously or imputedly liable; and (2) situations where the indemnitee is much less negligent than the indemnitor. The court could have clarified the confusion surrounding the active-passive distinction by eliminating use of that phrase entirely. The court should have simply stated that in the absence of a special relationship, there is no right to tort indemnity.

LAUREN N. SCHULTZ

633. Other jurisdictions have expressly limited the application of indemnity to situations when the indemnitee is not at fault or was owed a pre-existing duty by the indemnitor. *See, e.g.,* *Stewart v. Roy Bros.* 265 N.E.2d 357, 365 (Mass. 1970) (declining to permit indemnity on grounds that the party seeking indemnity was not exposed to liability vicariously or derivatively); *Minster Mach. Co. v. Diamond Stamping Co.*, 248 N.W.2d 676, 678-79 (Mich. Ct. App. 1976) (holding that indemnity does not extend to parties personally at fault for the harm); *Huck v. Gabriel Realty*, 346 A.2d 628, 631 (N.J. Super. Ct. Law Div. 1975) (refusing to grant indemnity because of misrepresentations by the party seeking indemnity).

634. *Franklin*, 350 Md. at 167-69, 711 A.2d at 189-90.

635. *See supra* notes 606-616 (describing relationships which may entitle a party to indemnity).

636. *Franklin*, 350 Md. at 156-58, 711 A.2d at 183-85.

D. An Examination of the Modern Employee's Dilemma and the Legitimacy of the Assumption of Risk Defense

In *ADM Partnership v. Martin*,⁶³⁷ the Court of Appeals examined “whether the ‘voluntariness’ element of the assumption of risk defense is met when an employee encounters a known risk” during the course of her employment but, on her subjective belief alone that her or her employer would suffer “adverse economic consequences,” the employee confronts the risk and in the process is injured.⁶³⁸ The court answered in the affirmative⁶³⁹ and remanded the case to the Court of Special Appeals, with an order to affirm the judgment of the circuit court.⁶⁴⁰ In so doing, the court reversed the Court of Special Appeals’s use of the “modern employee’s dilemma”⁶⁴¹ to prevent the “voluntariness” element of the assumption of risk defense from being satisfied under the fact pattern in this case.⁶⁴² The court concluded that the Court of Special Appeals had improperly distinguished *Schroyer v. McNeat*⁶⁴³ and *Burke v. Williams*⁶⁴⁴ from the case at hand to apply the modern employee’s dilemma.⁶⁴⁵ While the Court of Appeals was accurate in its construction of *Schroyer* and *Burke*,⁶⁴⁶ the court should, in future cases, abolish the use of the assumption of risk defense in certain employment situations and adopt the modern employee’s dilemma because the economic reasons for applying the assumption of risk defense are no longer applicable.⁶⁴⁷ The facts in

637. 348 Md. 84, 702 A.2d 730 (1997).

638. *Id.* at 87, 702 A.2d at 732.

639. *Id.*

640. *Id.* at 104, 702 A.2d at 740.

641. *Id.* at 94-95 & n.3, 702 A.2d at 736 & n.3. The “modern employee’s dilemma”: advances the view that an employee does not voluntarily or unreasonably assume the risk of a danger during the course of employment because “the competitiveness and pragmatism” of the real world workplace compel employees to either perform risky tasks or suffer various adverse employment consequences, ranging from termination to more subtle sanctions.

Id. at 94 n.3, 702 A.2d at 736 n.3 (quoting *Varilek v. Mitchell Eng’g Co.*, 558 N.E.2d 365, 376 (Ill. App. Ct. 1990)).

642. *See id.* at 90, 702 A.2d at 734. Assumption of risk is an affirmative defense; “the defendant must show that the plaintiff: (1) had knowledge of the risk of the danger; (2) appreciated that risk; and (3) voluntarily confronted the risk of danger.” *Id.* at 90-91, 702 A.2d at 734 (citing *Liscombe v. Potomac Edison Co.*, 303 Md. 619, 630, 495 A.2d 838, 843 (1985)).

643. 323 Md. 275, 592 A.2d 1119 (1991).

644. 244 Md. 154, 223 A.2d 187 (1966).

645. *ADM Partnership*, 348 Md. at 95-99, 702 A.2d at 736-38.

646. *See infra* notes 771-780 and accompanying text.

647. *See infra* notes 784-795 and accompanying text.

ADM Partnership, however, may be too far down that “slippery slope” for the modern employee’s dilemma to apply.⁶⁴⁸

1. *The Case.*—The respondent, Keen Tykenko Martin (Martin), was a delivery person for Ideal Reprographics, Inc., a blueprint reproduction company.⁶⁴⁹ On the morning of March 8, 1989, Martin was assigned to deliver blueprints to a business located in a building owned by ADM Partnership (ADM).⁶⁵⁰ Martin drove her pickup truck “into the parking lot directly in front of the walkway leading up to the building.”⁶⁵¹ Ice and snow surrounded ADM’s building, “particularly the parking lot directly in front of the building and the entrance walkway,” even though it had stopped precipitating nineteen hours earlier.⁶⁵²

At trial, Martin testified that she had noticed the unplowed snow and ice surrounding the building and that she had been curious why the snow had not been removed from the walkways.⁶⁵³ Martin also noted that other cars were parked in the lot, that there were footprints in the snow and ice, and that there were people working inside the building.⁶⁵⁴ From these facts, Martin deduced that there was a “safe means of ingress and egress to and from the building” and therefore felt that she could safely enter the building.⁶⁵⁵

Martin testified that she thought she had to complete the delivery if she wanted to keep her job, even though her employer had never related this to her explicitly.⁶⁵⁶ She reasoned that if she failed to make the delivery, Ideal Reprographics would lose the contract and she would then be terminated.⁶⁵⁷ Under this belief, she exited her pickup truck and “started around to the passenger side” to retrieve the blueprints for delivery.⁶⁵⁸ As she proceeded, Martin slipped on

648. See *infra* notes 806-811 and accompanying text.

649. *ADM Partnership*, 348 Md. at 88, 702 A.2d at 733. The facts of this case were not in dispute. *Id.*

650. *Id.*

651. *Martin v. ADM Partnership*, 106 Md. App. 652, 656, 666 A.2d 876, 878 (1995), *rev’d*, 348 Md. 84, 702 A.2d 730 (1997).

652. *ADM Partnership*, 348 Md. at 88, 702 A.2d at 733. Since the snow had stopped, the temperature had not risen above twenty-eight degrees Fahrenheit. Brief of the Respondents at 3, *ADM Partnership v. Martin*, 348 Md. 84, 702 A.2d 730 (1997) (No. 5).

653. *ADM Partnership*, 348 Md. at 88, 702 A.2d at 733.

654. *Id.*

655. *Id.* at 88-89, 702 A.2d at 733; see also Brief of the Respondents at 3-4, *ADM Partnership* (No. 5) (emphasizing that the building only had one means of egress and ingress).

656. *ADM Partnership*, 348 Md. at 89, 702 A.2d at 733.

657. *Id.*

658. *Id.*

the ice in the parking lot.⁶⁵⁹ She was able to stop her fall by grabbing on to her truck.⁶⁶⁰ Martin then continued her trek on the ice covered walkway and delivered the blueprints.⁶⁶¹ As she exited the building and made her way back to her truck, she slipped and fell a second time, seriously injuring her lower back.⁶⁶²

Martin filed suit against ADM in the Circuit Court for Montgomery County for “negligence in failing to keep their property safe.”⁶⁶³ The circuit court granted ADM’s motion for judgment⁶⁶⁴ after finding that the evidence “conclusively established” that Martin knew of the risk of walking on the ice and had voluntarily assumed the risk “of falling on a walkway covered with ice and snow.”⁶⁶⁵

The respondents appealed,⁶⁶⁶ and the Court of Special Appeals reversed the judgment after concluding that ADM did not meet the burden of demonstrating that Martin had voluntarily assumed the risk of injury.⁶⁶⁷ Specifically, the court found that Martin did not encounter the risk voluntarily “because she was not acting for her own convenience; rather, at the time of her injury, she was on a mission for her employer.”⁶⁶⁸ Therefore, enough evidence existed to create a question of fact for the jury concerning “whether [Martin] would have

659. *Id.*

660. *Id.*

661. *Id.*

662. *Id.*

663. *Martin v. ADM Partnership*, 106 Md. App. 652, 656, 666 A.2d 876, 879 (1995), *rev’d*, 348 Md. 84, 702 A.2d 730 (1997). Specifically, Martin contended that ADM was negligent in failing to maintain a safe walkway, failing to remove the snow and ice from the walkway and parking lot pursuant to local law, and failing to provide adequate warning of the dangerous condition. *ADM Partnership*, 348 Md. at 89, 702 A.2d at 733.

664. *ADM Partnership*, 348 Md. at 88, 702 A.2d at 732. ADM moved for judgment at the conclusion of Martin’s case, arguing that Martin had assumed the risk of her injuries. *ADM Partnership*, 106 Md. App. at 655, 666 A.2d at 878.

665. *ADM Partnership*, 348 Md. at 88, 702 A.2d at 732. The trial judge applied an objective standard and found that Martin had assumed the risk for three reasons: (1) “[e]verybody knows that walking on ice is slippery;” (2) Martin had admitted to seeing the ice on the walkway; and (3) that she had previously slipped on the ice. *Id.* at 90, 702 A.2d at 733. Additionally, the court disregarded her argument that she did not act voluntarily due to her “fear of termination” because she had made a “calculated decision . . . to take a chance and carefully walk across the walkway.” *Id.*, 702 A.2d at 733-34.

666. *ADM Partnership*, 106 Md. App. at 655-56, 666 A.2d at 878. Martin argued that the circuit court erred in granting the motion for judgment because “the evidence demonstrated that [ADM] failed to meet the burden of proof of their affirmative defense.” *Id.* at 656, 666 A.2d at 878.

667. *Id.* at 656, 664-65, 666 A.2d at 878, 882-83.

668. *Id.* at 660, 666 A.2d at 880. The Court of Special Appeals concluded that Martin was aware of and appreciated the danger of walking across an icy parking lot and walkway. *Id.* at 658, 659, 666 A.2d at 879, 880. This finding was not challenged in the Court of Appeals. *ADM Partnership*, 348 Md. at 90 n.2, 702 A.2d at 734 n.2.

suffered negative repercussions at her job had she not delivered the blueprints."⁶⁶⁹ The Court of Appeals granted certiorari to consider whether:

the 'voluntariness' element of the assumption of risk defense is met when an employee encounters a known risk while performing a responsibility of her employment . . . based solely on her subjective belief that the failure to fulfill that responsibility may result in adverse economic consequences to her employer and ultimately to herself.⁶⁷⁰

2. *Legal Background.*—The assumption of risk defense is deeply embedded in early English common law and is defined most accurately by the maxim *volenti non fit injuria* which means, "[t]o one who is willing no harm is done."⁶⁷¹ The Maryland courts have defined assumption of risk as requiring the defendant to demonstrate that the plaintiff "(1) had knowledge of the risk of the danger, (2) appreciated that risk and (3) voluntarily exposed himself to it."⁶⁷² The doctrine of assumption of risk has developed primarily in the employment context as a method of "insulat[ing] employers from liability for work-related injuries."⁶⁷³ Historically, the courts have either shunned the doctrine as archaic or have received it as a "logical safeguard grounded in economics and individualism."⁶⁷⁴

a. *The Recent Development of the Assumption of Risk Doctrine in Maryland.*—In *Burke v. Williams*,⁶⁷⁵ the Court of Appeals applied the assumption of risk defense to prohibit an employee from recovering for injuries sustained in the course of his employment. In *Burke*, an employee was injured when he fell into an excavation under a board walkway while delivering kitchen sinks to a partially constructed

669. *ADM Partnership*, 106 Md. App. at 665, 666 A.2d at 883.

670. *ADM Partnership*, 348 Md. at 87, 702 A.2d at 732.

671. See Jane P. North, Comment, *Employees' Assumption of Risk: Real or Illusory Choice?*, 52 TENN. L. REV. 35, 38 & n.19 (1984). This maxim first appeared in a 1305 English case, but in 1887, "the English jurist, Lord Justice Bowen, observed of the doctrine: 'This is not new law: it is as old as the Roman Digest, and has been accepted by the Courts of this country.'" *Id.* at 38 (quoting *Thomas v. Quartermaine*, 18 Q.B.D. 685, 696 (1887)); see also Ann D. Bray, Comment, *Does Old Wine Get Better with Age or Turn to Vinegar? Assumption of Risk in a Comparative Fault Era*—*Andren v. White Rodgers*, 18 WM. MITCHELL L. REV. 1141, 1144 (1992) (discussing the English roots of the assumption of risk doctrine).

672. *Liscombe v. Potomac Edison Co.*, 303 Md. 619, 630, 495 A.2d 838, 843 (1985) (citing *Stancill v. Potomac Elec. Power Co.*, 744 F.2d 861, 865 (D.C. Cir. 1984)).

673. Bray, *supra* note 671, at 1144.

674. North, *supra* note 671, at 35 (citing *Suter v. San Angelo Foundry & Mach. Co.*, 406 A.2d 140, 165-66 (N.J. 1979) (Clifford, J., concurring)).

675. 244 Md. 154, 223 A.2d 187 (1966).

house.⁶⁷⁶ The court held that the employee had voluntarily assumed the risk of being injured even though no other entrance besides the walkway existed.⁶⁷⁷ The employee was aware of the “previously created risk” of using the walkway and still chose “to put up with the situation” so that “his willingness to take a chance is implied and he [is] barred from recovering for a risk he chose to assume.”⁶⁷⁸ The Court of Appeals refused to accept the employee’s argument that the “economic necessity of keeping his job and not being discharged for failure to deliver the sink tops” should nullify the assumption of risk defense.⁶⁷⁹ The employee argued that because the economic necessity “forced him to involuntarily assume the risk of crossing the slippery walkway,”⁶⁸⁰ the assumption of risk defense should have been nullified. The court dismissed this contention, however, because no evidence existed that anyone demanded that the employee use the walkway, and there was no evidence that he would have lost his job if he had left the sinks at the construction site without bringing them into the house.⁶⁸¹

Twenty-five years later, in *Schroyer v. McNeal*,⁶⁸² the Court of Appeals appeared to distinguish employment from nonemployment contexts with regard to the applicability of the assumption of risk defense.⁶⁸³ The court considered whether the plaintiff had assumed the risk of injury by walking across an icy parking lot to enter the hotel at which she was spending the night.⁶⁸⁴ The court first described the differences and similarities between contributory negligence and assumption of risk.⁶⁸⁵ The court noted the significant difference between the two defenses: “Contributory negligence defeats recovery because it is a proximate cause of the accident which happens, but assumption of risk defeats recovery because it is a previous abandon-

676. *Id.* at 156, 223 A.2d at 188.

677. *Id.* at 158, 223 A.2d at 189. The employee provided evidence that the boards were slippery “because of mud and slush from melting snow” and that “the boards had a tendency to give and bob up and down when stepped on.” *Id.* at 157, 223 A.2d at 188.

678. *Id.* at 157-58, 223 A.2d at 189.

679. *Id.* at 158, 223 A.2d at 189.

680. *Id.*

681. *Id.*

682. 323 Md. 275, 592 A.2d 1119 (1991).

683. See *infra* note 692 and accompanying text.

684. *Schroyer*, 323 Md. at 279, 592 A.2d at 1121. McNeal, after registering at the hotel, parked her car “on packed ice and snow” and noticed that the sidewalk near the entrance through which she was to enter had not been shoveled and was slippery. *Id.* at 278-79, 592 A.2d at 1121. She made the first trip successfully from her car to the entrance, but on the return trip to her car slipped and fell. *Id.*

685. *Id.* at 280-83, 592 A.2d at 1121-23 (stating that the two are “closely related and often overlap[]”).

ment of the right to complain if an accident occurs.”⁶⁸⁶ The court declared that this distinction is clearly made by the rationale underlying the doctrine of assumption of risk.⁶⁸⁷ With assumption of risk, the plaintiff “consent[s] to relieve the defendant of an obligation of conduct toward him, and to take his chances of harm from a particular risk.”⁶⁸⁸

The court in *Schroyer* further stated that an objective test should be used to determine whether a “plaintiff knows of, and appreciates, the risk involved in a particular situation.”⁶⁸⁹ The court mandated that “when it is clear that a person of normal intelligence in the position of the plaintiff must have understood the danger, the issue is for the court.”⁶⁹⁰ In *Schroyer*, the court held that the obvious danger of slipping on ice is a risk “which any one of adult age must be taken to appreciate.”⁶⁹¹ The court, in holding that the plaintiff had assumed the risk, seemed to differentiate this case from employment cases by pointing out that the plaintiff in *Schroyer* had crossed the icy parking lot and sidewalk “for her own purposes, i.e. her convenience in unloading her belongings.”⁶⁹² The court concluded that the plaintiff’s voluntary action of parking her car on the ice and traversing it relieved the defendant of any responsibility.⁶⁹³

686. *Id.* at 281, 592 A.2d at 1122 (internal quotation marks omitted) (quoting *Warner v. Markoe*, 171 Md. 351, 559-60, 189 A. 260, 264 (1937)). The court in *Warner* also stated that “[c]ontributory negligence, of course, means negligence which contributes to cause a particular accident which occurs, while assumption of risk of accident means voluntary incurring that of an accident which may not occur, and which the person assuming the risk may be careful to avoid after starting.” *Warner*, 171 Md. at 359-60, 189 A. at 264.

687. *Schroyer*, 323 Md. at 281-82, 592 A.2d at 1122.

688. *Id.* (quoting *Gibson v. Beaver*, 245 Md. 418, 421, 226 A.2d 273, 275 (1967) (quoting WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS § 55, at 303 (2d ed. 1955))). The court asserted that “[i]t is . . . the willingness of the plaintiff to take an informed chance that distinguishes assumption of the risk from contributory negligence.” *Id.* at 283, 592 A.2d at 1123; see *Burke v. Williams*, 244 Md. 154, 157, 223 A.2d 187, 189 (1966) (stating that assumption of risk “implies an intentional exposure to a known danger which may or may not be true of contributory negligence” (citing *People’s Drug Stores v. Windham*, 178 Md. 172, 12 A.2d 532 (1940))).

689. *Schroyer*, 323 Md. at 283, 592 A.2d at 1123 (citing *Gibson*, 245 Md. at 421, 226 A.2d at 275).

690. *Id.* at 283-84, 592 A.2d at 1123; see *Gibson*, 245 Md. at 421, 226 A.2d at 275 (quoting PROSSER, *supra* note 688, § 55, at 310)).

691. *Schroyer*, 323 Md. at 284, 592 A.2d at 1123 (internal quotation marks omitted) (quoting PROSSER, *supra* note 688, § 55, at 310).

692. *Id.* at 288, 592 A.2d at 1125. The court stated that McNeal was “[f]ully aware of the danger posed by an ice and snow covered parking lot and sidewalk, [and] she voluntarily chose to park and traverse it, *albeit* carefully, for her own purposes, i.e. her convenience in unloading her belongings.” *Id.*

693. *Id.*

b. *The Development of the Modern Employee's Dilemma as an Exception to the "Voluntariness" Element of the Assumption of Risk Defense.*—While Maryland courts continue to apply the assumption of risk doctrine in employment cases, other courts have long recognized the weaknesses of this doctrine. The discussion of assumption of risk in *Tiller v. Atlantic Coast Line Railroad Co.*⁶⁹⁴ has been used by many jurisdictions to describe the defense's history,⁶⁹⁵ to demonstrate its erosion,⁶⁹⁶ and to support the jurisdiction's eradication of the defense.⁶⁹⁷ The Supreme Court in *Tiller* addressed the detriments and the archaism of the assumption of risk doctrine in the employment context.⁶⁹⁸ In *Tiller*, the Court held that the Federal Employers' Liability Act (FELA) had abolished the assumption of risk defense in employment situations where the employer was negligent and FELA applied.⁶⁹⁹ The Court stated that the original theory behind the assumption of risk defense was no longer applicable as evidenced by Congress's passage of a 1939 amendment to FELA.⁷⁰⁰ The amendment required "cases tried under the Federal Act to be handled as though no doctrine of assumption of risk had ever existed."⁷⁰¹ Moreover, the Court cautioned that no case should be withheld from the jury on the theory of assumption of risk and "questions of negligence should under

694. 318 U.S. 54 (1943).

695. See *Williamson v. Smith*, 491 P.2d 1147, 1149 (N.M. 1971) (using *Tiller* to explain why assumption of risk has been adopted); *Siragusa v. Swedish Hosp.*, 373 P.2d 767, 770-71 (Wash. 1962) (en banc) (stating that the *Tiller* decision has "adroitly summarized" the history and the development of assumption of risk).

696. See *North*, *supra* note 671, at 43 (maintaining that the *Tiller* decision is part of the corrosion of the assumption of risk defense).

697. See *Rhoads v. Service Mach. Co., Inc.*, 329 F. Supp. 367, 380 (E.D. Ark. 1971) (mem.) (using *Tiller* to support the court's statement that the assumption of risk defense has been "inhumane, anachronistic, and unnecessary").

698. *Tiller*, 318 U.S. at 58-65.

699. *Id.* at 58.

700. *Id.* at 58-59, 62-64. The Court stated that the original doctrine of assumption of risk was supported by the belief that "an opposite doctrine would not only subject employers to unreasonable and often ruinous responsibilities, thereby embarrassing all branches of business, but would also encourage carelessness on the part of the employee." *Id.* at 59 (quoting *Tuttle v. Detroit, Grand Haven & Milwaukee Ry.*, 122 U.S. 189, 196 (1887)). The sponsor of the amendment to the Act rejected this economic theory because "[i]n these days when millions are unemployed and must find work in order to save themselves and their families from distress, the situation is so desperate that men will sign any sort of waiver or agreement in order to obtain employment." *Id.* at 61 n.12 (internal quotation marks omitted) (quoting *Amending the Federal Employers' Liability Act: Hearings on S. 1708 Before the Subcomm. of the Senate Judiciary Comm.*, 76th Cong., 1st Sess. 33-34 (1939) (statement of Senator Neely)).

701. *Id.* at 64. The legislative history asserted that abrogation of the defense was necessary because it was "out of harmony with the equitable principles which should govern determinations of employer-employee responsibilities." *Id.* at 65 (citation omitted).

proper charge from the court be submitted to the jury for their determination."⁷⁰²

Other jurisdictions have employed the Supreme Court's critique of assumption of risk to aid in abolishing the use of the doctrine in products liability cases in employment settings. In *Varilek v. Mitchell Engineering Co.*,⁷⁰³ an Illinois appellate court held that a defendant in a products liability case cannot argue that an injured worker assumed the risk of injury "because he had a voluntary choice to make in that he could have chosen not to do his job."⁷⁰⁴ The main issue of the case was whether there was enough evidence to show that the plaintiff had met the voluntary prong of the assumption of risk defense.⁷⁰⁵ The plaintiff, an ironworker, slipped and fell while installing panels to complete the roof of a building.⁷⁰⁶ The court noted that the only way for the plaintiff to complete his task was to walk on the panels which caused him to fall and that he "was compelled to accept the risk of walking on the panels in order to exercise and protect his right and privilege to his job."⁷⁰⁷ The court held that the plaintiff was not required to provide evidence that he would lose his job if he had refused to complete his task because such evidence is not requisite to demonstrating that a plaintiff voluntarily assumed the risk of injury.⁷⁰⁸ The court reasoned that despite the "theoretical liberty of every person to contract for his labor or services and his legal right to abandon his employment if the conditions of service are not satisfactory," practically speaking, a laborer has no such choice because of the prospect of poverty, scarcity of employment, and the dependence of his family.⁷⁰⁹ Such circumstances mean that a laborer does not truly confront

702. *Id.* at 67. Courts still must determine negligence and "whether that negligence was the proximate cause of the injury." *Id.*; see also North, *supra* note 671, at 42-44 (discussing FELA and state worker compensation statutes).

703. 558 N.E.2d 365 (Ill. App. Ct. 1990).

704. *Id.* at 376; see also *Rhoads*, 329 F. Supp. at 381 (holding that the defense of assumption of risk is inapplicable in products liability cases in which an employee is hurt by dangerous machinery during the course of employment); *Johnson v. Clark Equip. Co.*, 547 P.2d 132, 140 (Or. 1976) (stating that in a products liability case involving an employee injured in the course of employment the jury should ascertain whether the plaintiff's actions were reasonable by considering "the conditions which motivated the decision, the pressures which were operating on the plaintiff, and the amount of time which he had to make the decision"); North, *supra* note 671, at 56-59 (discussing the abrogation of the assumption of risk defense in employment situations in both *Johnson* and in *Rhoads*).

705. *Varilek*, 558 N.E.2d at 374.

706. *Id.* at 369-71.

707. *Id.* at 375.

708. *Id.* at 376.

709. *Id.* (quoting *Streeter v. Western Wheeled Scraper Co.*, 98 N.E. 541, 546 (Ill. 1912)).

the dangers associated with his employment voluntarily.⁷¹⁰ The court concluded that “public policy in work-related product liability injury cases” compelled this decision because “virtually everyone in the work force of our society uses some manufactured product” and injuries from such products are usually “grave and often permanent.”⁷¹¹

Similarly, in 1991, the Supreme Court of Ohio held that the assumption of risk defense should be abolished in the employment context and work-related injury claims. In *Cremeans v. Willmar Henderson Manufacturing Co.*,⁷¹² the court reasoned that “an employee does not voluntarily or unreasonably assume the risk of injury which occurs in the course of his or her employment when he or she encounters that risk in the normal performance of his or her required job duties.”⁷¹³ Cremeans, an employee for Sohio Chemical Company, was injured while operating a loader during his regular course of employment.⁷¹⁴ The loader was manufactured by Willmar Henderson Manufacturing Company, and Sohio purchased the loader without a protective cage, which Willmar also manufactures.⁷¹⁵ Cremeans claimed that the loader was defective and dangerous without the cage.⁷¹⁶ His job was to drive the loader into fertilizer bins, scoop up some fertilizer, back out, and bring it to another location.⁷¹⁷ If the cage or any other structures had been attached to the loader, it would not have fit into the bins.⁷¹⁸ As Cremeans drove the loader into the bin, “an avalanche of fertilizer occurred” and Cremeans “was injured when the rear wheels

710. See *id.* (noting that given the circumstances faced by laborers, the argument that a laborer voluntarily assumed the risk of injury because he could have chosen not to do his job is “specious”); see also *Suter v. San Angelo Foundry & Mach. Co.*, 406 A.2d 140, 148 (N.J. 1979) (stating that an employee who is engaged in his assigned task “has no meaningful choice” but to encounter the risk and thus cannot voluntarily assume the risk of injury); *Brown v. Quick Mix Co.*, 454 P.2d 205, 208 (Wash. 1969) (en banc) (asserting that “[i]t could never be said as a matter of law that a workman whose job requires him to expose himself to a danger, voluntarily and unreasonably encounters the same” (citing *Miller v. St. Regis Paper Co.*, 374 P.2d 675 (Wash. 1962) (en banc))); North, *supra* note 671, at 54-55 (discussing the holding in *Suter* and concluding that the case stands for “the principle that, as a matter of public policy, workers injured while doing their assigned work cannot be found to have assumed the risk”).

711. *Varilek*, 558 N.E.2d at 376.

712. 566 N.E.2d 1203 (Ohio 1991).

713. *Id.* at 1207.

714. *Id.* at 1204.

715. *Id.*

716. *Id.*

717. *Id.*

718. *Id.* Apparently, Sohio and Cremeans had agreed that Sohio would assume any liability arising from the removal of the protective cage. *Id.*

of the loader lifted off the ground" and Cremeans became wedged into the loader.⁷¹⁹

Cremeans was aware of the possibility of such an avalanche, but he had never heard of any resulting injuries.⁷²⁰ Willmar, however, claimed that Cremeans was barred from recovery because he had assumed the risk.⁷²¹ The court found that the assumption of risk defense did not apply in this situation because Cremeans could not have voluntarily assumed the risk due to the economic pressures of the workplace.⁷²²

Additionally, the court held that the historical reasons for the utilization of the assumption of risk defense were no longer valid in the twentieth century.⁷²³ The court stated that the trend has been to move away from the assumption of risk defense in employment situations because the defense runs counter to "any current social policy,"⁷²⁴ such as the modern workmen's compensation legislation and "our legal policy of requiring the employer to provide his employees with a reasonably safe place to work."⁷²⁵

719. *Id.* at 1205.

720. *Id.*

721. *Id.*

722. *Id.* at 1208.

723. *Id.* at 1205-06, 1207. The court stated that the original rationale for application of the assumption of risk defense was to give "maximum freedom to expanding industry" by "insulat[ing] the employer as much as possible from bearing the 'human overhead' which is an inevitable part of . . . the doing of industrialized business." *Id.* at 1205 (internal quotation marks omitted) (quoting *Tiller v. Atlantic Coast Line R.R. Co.*, 318 U.S. 54, 59 (1943)). It was rooted in an economic theory that "there was complete mobility of labor, . . . that the supply of work was unlimited," and that the worker was "an entirely free agent not compelled to enter into a particular employment relationship." *Id.* at 1205-06 (citing *W. PAGE KEETON ET AL., PROSSER & KEETON ON THE LAW OF TORTS* § 80, at 568-69 (W. Keeton ed., 5th ed. 1984)).

724. *Id.* at 1206-07. According to the court, workmen's compensation legislation reflects public opinion and "has dictated a change in the underlying concepts of employers' responsibility." *Id.* at 1206 (internal quotation marks omitted) (quoting *Siragusa v. Swedish Hosp.*, 373 P.2d 767, 773 (Wash. 1962) (en banc)).

725. *Id.* at 1206-07; see also *Williamson v. Smith*, 491 P.2d 1147, 1150 (N.M. 1971) (abolishing the assumption of risk defense in employment situations because it is "directly counter to current social policy," particularly workmen's compensation legislation); *Siragusa*, 373 P.2d at 773 (abolishing assumption of risk defense when an employer's negligence causes an employee's injury because the policy reasons that once supported the defense are no longer applicable); North, *supra* note 671, at 51-62 (outlining the policy reasons supporting abrogation of the assumption of risk defense in the employment context); cf. *Kitchens v. Winter Co. Builders, Inc.*, 289 S.E.2d 807, 809-10 (Ga. Ct. App. 1982) (stating that "[a]ny construction worker as a servant and employee has a certain amount of his freedom of choice restricted by the circumstances under which he works and the coercion of seeking to remain employed," but declining to permit the plaintiff construction worker to collect for his injuries caused by the negligence of the defendant prime contrac-

Therefore, the court decided to abrogate the assumption of risk defense in the employment context because “the days of laissez-faire economics are long gone.”⁷²⁶ Furthermore, the court stated that the assumption of risk defense does not belong in today’s employment setting in which employees have to choose between the risk of employment and finding a new job in a shrinking job market.⁷²⁷

The court also pointed out that the assumption of risk defense should be made unavailable to both the employer and the manufacturer for two reasons.⁷²⁸ First, “the decision to encounter the risk was equally involuntary regardless of who commissioned the employee to perform his or her duty.”⁷²⁹ Additionally, many cases that have dealt with the assumption of risk defense in similar contexts have not distinguished between employers and manufacturers.⁷³⁰ This point is especially important because it demonstrates how assumption of risk works in the case of third parties.

3. *The Court’s Reasoning.*—In *ADM Partnership v. Martin*, the Court of Appeals held that an employee injured in the course of employment cannot assert that she did not *voluntarily* assume a known risk because she held a subjective belief that failure to perform her task would result in negative economic consequences for her and her employer.⁷³¹ Writing for the majority, Chief Judge Bell began by setting out the criteria for satisfying the defense of assumption of risk in Maryland;⁷³² the defendant must show that the plaintiff: “(1) had knowledge of the risk of the danger; (2) appreciated that risk; and (3) voluntarily confronted the risk of danger.”⁷³³ First, the court focused on determining the standard for the “voluntariness” element of as-

tor because he had already received workers’ compensation from the subcontractor that employed him).

726. *Cremeans*, 566 N.E.2d at 1207; see *infra* note 786 and accompanying text (describing laissez-faire economic policy).

727. *Cremeans*, 566 N.E.2d at 1207. The Ohio court felt it was time to follow the trend of other jurisdictions. *Id.* (citing North, *supra* note 671).

728. *Id.* at 1208.

729. *Id.*

730. See *Suter v. San Angelo Foundry & Mach. Co.*, 406 A.2d 140, 141-42 (N.J. 1979) (allowing the manufacturer to use the assumption of risk defense where an employee was injured by a piece of equipment owned by the employer who bought it from the manufacturer); *Johnson v. Clark Equip. Co.*, 547 P.2d 132, 137 (Or. 1976); *Brown v. Quick Mix Co.*, 454 P.2d 205, 207-08 (Wash. 1969) (en banc) (same); see also *Kitchens*, 289 S.E.2d at 809-10 (permitting the prime contractor to use the defense against an employee of a subcontractor).

731. *ADM Partnership*, 348 Md. at 87, 702 A.2d at 732.

732. *Id.* at 90-91, 702 A.2d at 734.

733. *Id.* (citing *Liscombe v. Potomac Edison Co.*, 303 Md. 619, 630, 495 A.2d 838 (1985)).

sumption of risk⁷³⁴ and stated that, for a plaintiff to be deemed to have voluntarily exposed herself to a known danger, "there must be some manifestation of consent to relieve the defendant of the obligation of reasonable conduct."⁷³⁵ The risk will not be assumed if, from the plaintiff's words or from the facts of the case, it appears that the plaintiff did not consent to discharge the defendant of the obligation to protect the plaintiff.⁷³⁶ If the plaintiff enters voluntarily into a situation that involves risk, however, then this action indicates that she consented even though she may have consented reluctantly.⁷³⁷ The court cautioned that a plaintiff does not act voluntarily if she had no reasonable alternative but to confront the danger due to circumstances created by the defendant or coercion by the defendant.⁷³⁸ The plaintiff, however, does act voluntarily when she acts "under the compulsion of circumstances, not created by the tortious conduct of the defendant, which have left [her] no reasonable alternative."⁷³⁹

The court then analyzed the Court of Special Appeals's conclusion that the question whether Martin acted voluntarily, and thus assumed the risk, was for the jury because the fact that Martin feared she could lose her job if she failed to traverse the icy path to deliver the blueprints may have "deprived [her] of a clear and reasonable choice" to confront the risk.⁷⁴⁰ The court stated that it disagreed with "the proposition that an employee, who, in the fulfillment of a job requirement, encounters the risk of a known danger does not act voluntarily because he or she will not have been given 'a clear and rea-

734. *Id.* at 90 n.2, 702 A.2d at 734 n.2 (stating that the knowledge and appreciation elements were not challenged on appeal).

735. *Id.* at 92, 702 A.2d at 734 (internal quotation marks omitted) (quoting KEETON ET AL., *supra* note 723, § 68, at 490).

736. *Id.*, 702 A.2d at 734-35 (quoting KEETON ET AL., *supra* note 723, § 68, at 490).

737. *Id.* (quoting KEETON ET AL., *supra* note 723, § 68, at 490).

738. *Id.* at 92-93, 702 A.2d at 735 (quoting KEETON ET AL., *supra* note 723, § 68, at 490-91). The court noted that "[w]here the defendant puts [the plaintiff] to a choice of evils, there is a species of duress, which destroys the idea of freedom of election." *Id.* (internal quotation marks omitted) (quoting KEETON ET AL., *supra* note 723, § 68, at 490-91). The *Restatement (Second) of Torts* states that the "plaintiff's acceptance of the risk is not to be regarded as voluntary where the defendant's tortious conduct has forced upon him a choice of courses of conduct, which leaves him no reasonable alternative to taking his chances." RESTATEMENT (SECOND) OF TORTS § 496E cmt. c (1965).

739. *ADM Partnership*, 348 Md. at 93, 702 A.2d at 735 (quoting RESTATEMENT (SECOND) OF TORTS § 496E cmt. b). The *Restatement* provides the example of "a plaintiff who is forced to rent a house which is in obvious dangerous condition because he cannot find another dwelling, or cannot afford another," stating that such a plaintiff "assumes the risk notwithstanding the compulsion under which he is acting." *Id.* (quoting RESTATEMENT (SECOND) OF TORTS § 496E cmt. b).

740. *Id.* at 94, 702 A.2d at 735-36 (quoting *Martin v. ADM Partnership*, 106 Md. App. 652, 661, 666 A.2d 876, 881 (1995), *rev'd*, 348 Md. 84, 702 A.2d 730 (1997)).

sonable choice either to act or not act,”⁷⁴¹ and refuted the Court of Special Appeals’s reliance on *Schroyer* and *Burke* in reaching the opposite conclusion.⁷⁴²

The Court of Special Appeals stated that the Court of Appeals in *Schroyer* had held that the plaintiff’s “actions were voluntary because she was not acting for her employer, but rather, was acting for her own benefit.”⁷⁴³ The Court of Special Appeals used this conclusion to distinguish Martin, who was acting in an employment context, from the plaintiff in *Schroyer*, who was not.⁷⁴⁴ The court stated that Martin had a “convincing argument” that unlike the plaintiff in *Schroyer*, Martin “did not voluntarily encounter the risk because she was not acting for her own convenience; rather, at the time of her injury, she was on a mission for her employer.”⁷⁴⁵

The Court of Appeals refuted the Court of Special Appeals’s reliance on *Schroyer* by stating that the Court of Appeals never touched the issue of employment or its scope in *Schroyer*, not even “peripherally.”⁷⁴⁶ According to the court, the decision was very clear in *Schroyer*: the plaintiff had “intentionally, knowingly and voluntarily assumed the risk of the danger that caused her injuries” and “[t]here was simply no evidence . . . to suggest that the plaintiff’s employment was adversely affected and, therefore, we did not address that issue.”⁷⁴⁷

The Court of Appeals next addressed the Court of Special Appeals’s reliance on its decision in *Burke*.⁷⁴⁸ The Court of Special Appeals had distinguished the instant case from *Burke* by inferring that the plaintiff in *Burke* only had to deliver the sinks to the site “[i]n order to complete the job assignment successfully,” and “[b]y taking it upon himself to move the sinks into the house through the carport, the plaintiff chose to undertake a voluntary activity that subjected him to an assumption of risk defense.”⁷⁴⁹ The Court of Appeals would not

741. *Id.* at 95, 702 A.2d at 736 (quoting *ADM Partnership*, 106 Md. App. at 661, 666 A.2d at 881).

742. *Id.*

743. *ADM Partnership*, 106 Md. App. at 659, 666 A.2d at 880.

744. *Id.*

745. *Id.* at 660, 666 A.2d at 880.

746. *ADM Partnership*, 348 Md. at 98, 702 A.2d at 737.

747. *Id.*

748. *Id.*, 702 A.2d 737-38; see *ADM Partnership*, 106 Md. App. at 660-61, 666 A.2d at 880-81; see also *supra* notes 675-681 and accompanying text (discussing the facts of *Burke*).

749. *ADM Partnership*, 348 Md. at 96, 702 A.2d 737 (alterations in original) (internal quotation marks omitted) (quoting *ADM Partnership*, 106 Md. App. at 661, 666 A.2d at 881). The Court of Special Appeals came to this conclusion by using the Court of Appeals’s assertion in *Burke* that there was no evidence that the owners of the house demanded that the plaintiff use “the walkway against his will” or that he would have lost his

permit this inference because the *Burke* court did not hold "that the plaintiff's job requirements established the point at which 'carrying out an employment responsibility become[s] a voluntary act.'"⁷⁵⁰ Rather, the *Burke* court held that there was no evidence that the "plaintiff was not acting on his own volition or free will, or that his employment would have been in jeopardy" if he had refused to deliver the sinks inside the house.⁷⁵¹ Furthermore, the court stated that there was nothing in *Burke* to suggest "that only the plaintiff's subjective belief that an adverse impact on employment would occur would have been taken as 'evidence'" that the plaintiff's acts were not voluntary⁷⁵² and noted that the standard to be applied in determining whether one voluntarily assumed the risk is an objective one.⁷⁵³

The court then asserted that *Burke* is a stronger assumption of risk case than *ADM Partnership* because in *Burke* the plaintiff was "specifically asked by the defendant to do the very act that resulted in his injuries."⁷⁵⁴ However, the court stated that an employer explicitly asking an employee to do an act that requires an employee to assume the risk of injury is not enough by itself to support the assertion that an employee did not voluntarily assume the risk of injury.⁷⁵⁵ The court continued, stating that the plaintiffs in *Burke* and in the instant case failed to offer evidence of their respective states of mind.⁷⁵⁶ The court stated that "there is not a shred of evidence from which Martin's concern for her job if the delivery were not made can be inferred."⁷⁵⁷

Lastly, the court analyzed Martin's reliance on *Gibson v. Beaver*⁷⁵⁸ to support her argument that even though ADM was not the source of the coercion, it could still be held liable for the injuries Martin sus-

job if he had left the sinks "on the construction site instead of taking them into the house." *Id.* (citing *ADM Partnership*, 106 Md. App. at 661, 666 A.2d at 876 and quoting *Burke v. Williams*, 244 Md. 154, 158, 223 A.2d 187, 189 (1966)).

750. *Id.* at 98, 702 A.2d at 737 (alteration in original) (quoting *ADM Partnership*, 106 Md. App. at 661, 666 A.2d at 881).

751. *Id.*, 702 A.2d at 737-38; see also *Gibson v. Beaver*, 245 Md. 418, 422, 226 A.2d 273, 276 (1967) (stating that the arguments in *Burke* were discarded "because there was no showing that the act of the plaintiff which produced the harm was done by him against his will").

752. *ADM Partnership*, 348 Md. at 98, 702 A.2d at 738.

753. *Id.* (citing *Schroyer v. McNeal*, 323 Md. 275, 283, 592 A.2d 1119, 1123 (1991)).

754. *Id.*

755. *Id.* at 98-99, 702 A.2d at 738 (citing *Velte v. Nichols*, 211 Md. 353, 127 A.2d 544 (1956), in which the court held that a purchaser had assumed the risk of climbing a ladder even though the merchant told him to).

756. *Id.* at 99-101, 702 A.2d at 738-39. There was no evidence that the plaintiff's actions were not volitional in either *Burke* or the instant case. *Id.* at 99, 702 A.2d at 738.

757. *Id.* at 101, 702 A.2d at 739.

758. 245 Md. 418, 226 A.2d 273 (1967).

tained.⁷⁵⁹ Martin attempted to use *Gibson* to infer that ADM breached their tort-based duty “to make conditions of the relationship between the plaintiff and defendant safer than they appear to be” and that ADM “may also be responsible for the coercive element experienced by the plaintiff no matter where it emanates from.”⁷⁶⁰ Martin came to this conclusion by employing the court’s holding in *Gibson* that “[the] defendant is under no duty to make the conditions of their association any safer than they appear to be” and inferring that this meant the court was acknowledging a contractual relationship between the plaintiff and the defendant in *Gibson* in which the defendant had no “tort-like obligation” and owed no duty to the plaintiff.⁷⁶¹ Martin then used this inference to come to the conclusion that if the defendant has a duty “to make conditions of the relationship between the plaintiff and defendant safer than they appear to be, the rule does not apply and the coercion may emanate from sources other than the defendant.”⁷⁶²

However, the court rejected Martin’s argument and stated that duty and defendant’s negligence are not necessary to establish assumption of risk, but “the assumption of risk defense exists independently of the conduct of another person, whether the defendant or a third party.”⁷⁶³ Thus, the court concluded that Martin, similar to the plaintiffs in *Gibson* and *Burke*, exercised her “own volition in encoun-

759. *ADM Partnership*, 348 Md. at 101, 702 A.2d at 739. In *Gibson*, a 55-year-old man suffered a heart attack while helping an oil and heating deliveryman pull a hose from the truck to the back of his house. *Gibson*, 245 Md. at 420, 226 A.2d at 275. The deliveryman told the plaintiff that if he did not help him, he would not receive any fuel to heat his house. *Id.* The plaintiff argued that he was coerced into the situation in which he was injured. *Id.* at 422, 226 A.2d at 276. The court held that the plaintiff *voluntarily* assumed the risk, observing:

The plaintiff takes a risk voluntarily (within the meaning of the present rule) where the defendant has a right to face him with the dilemma of “take it or leave it”—in other words, where defendant is under no duty to make the conditions of their association any safer than they appear to be. In such a case it does not matter that [the] plaintiff is coerced to assume the risk by some force not emanating from defendant, such as poverty, dearth of living quarters, or a sense of moral responsibility.

Id. at 422-23, 226 A.2d at 276 (internal quotation marks omitted) (quoting 2 FOWLER V. HARPER & FLEMING JAMES, JR., THE LAW OF TORTS § 21.3, at 1174 (1956)).

760. *ADM Partnership*, 348 Md. at 102, 702 A.2d at 739-40.

761. *Id.* at 101-02, 702 A.2d at 739 (internal quotation marks omitted) (quoting *Gibson*, 245 Md. at 422-23, 226 A.2d at 276; 2 HARPER AND JAMES, TORTS § 21.3, at 1174 (1956)).

762. *Id.*

763. *Id.* at 102-03, 702 A.2d at 740 (stating that “[u]nlike contributory negligence, the assumption of risk defense exists independently of the conduct of another person, whether the defendant or a third party”); see also *Schroyer v. McNeal*, 323 Md. 275, 282-83, 592 A.2d 1119, 1122-23 (1990) (discussing the difference between contributory negligence and assumption of risk).

tering a known danger, and thus voluntarily assum[ed] the risks it entail[ed]."⁷⁶⁴

4. *Analysis.*—The Court of Appeals in *ADM Partnership v. Martin* held that the "voluntariness" element of the assumption of risk defense is met when an employee encounters a known risk during the course of performing employment responsibilities, proceeds to confront the risk, and then is injured by the risk, even though the employee confronts the risk based on a subjective belief that she will suffer "adverse economic consequences" if she does not perform the task.⁷⁶⁵ The court came to this conclusion by following the precedent of *Schroyer* and *Burke* and refusing to adopt the modern employee's dilemma.⁷⁶⁶ While the Court of Appeals correctly utilized *Schroyer* and *Burke* in its analysis, the court should abolish the assumption of risk defense in certain employment situations because the economic basis for the defense no longer exists.⁷⁶⁷ However, the facts in *ADM Partnership* may not be strong enough to apply the modern employee's dilemma, and thus it would be unreasonable to abolish the defense of assumption of risk under the circumstances of this case.⁷⁶⁸

a. *The Application of Schroyer and Burke.*—The Court of Special Appeals incorrectly concluded that the Court of Appeals held that the actions of the plaintiff in *Schroyer* "were voluntary because she was not acting for her employer, but rather, was acting for her own benefit."⁷⁶⁹ As the Court of Appeals in *ADM Partnership* aptly noted, the court never mentioned the plaintiff's employment, employer, or

764. *ADM Partnership*, 348 Md. at 103, 702 A.2d at 740.

765. *Id.* at 87, 702 A.2d at 732.

766. *Id.* at 95, 96-99, 702 A.2d at 736, 737-38.

767. See North, *supra* note 671, at 50-51, 65 (stating that the abrogation of assumption of risk in employment situations is consistent with today's economic and social policies which are based on "wage-based employment" rather than an economy based on the Industrial Revolution with mainly "industry workers" which were primarily "self-employed and enterprise employed"); see also *supra* notes 713-725 and accompanying text (describing the *Creameans* decision and its reliance on the change in economic reasons that form the basis for the assumption of risk defense to abolish the defense in the context of work related injury claims).

768. But see *ADM Partnership*, 348 Md. at 104, 702 A.2d at 740 (Eldridge, J., dissenting) (disagreeing with the majority for the reasons set forth in the Court of Special Appeals's decision); *Martin v. ADM Partnership*, 106 Md. App. 652, 665, 666 A.2d 876, 883 (1995) (contending that the facts of the case were strong enough to apply the modern employee's dilemma and holding that the employee did not voluntarily assume the risk of injury), *rev'd*, 348 Md. 84, 702 A.2d 730 (1997).

769. See *ADM Partnership*, 106 Md. App. at 659, 666 A.2d at 880; see *supra* notes 743-747 and accompanying text (discussing the Court of Appeals's interpretation of its decision in *Schroyer*).

its scope in *Schroyer*, or even considered any of these factors “peripherally.”⁷⁷⁰ What the court actually stated in *Schroyer* was that McNeal, the plaintiff, took an “informed chance” to “voluntarily . . . park and traverse [the icy parking lot], *albeit* carefully, for her own purposes, *i.e.* her convenience in unloading her belongings.”⁷⁷¹ The Court of Special Appeals correctly noted that Martin and McNeal were acting in different contexts, *i.e.* Martin was in an employment situation and McNeal was not.⁷⁷² Nevertheless, it is quite obvious that the Court of Appeals did not intend for *Schroyer* to draw such a distinction.⁷⁷³ The economic coercion argument is valid under certain circumstances in employment settings, but this argument is not supported by the facts in this case nor by Maryland’s precedent as the Court of Special Appeals attempted to assert.⁷⁷⁴ Thus, the Court of Appeals was correct in asserting that the Court of Special Appeals was flawed in its understanding of *Schroyer*.⁷⁷⁵

The Court of Special Appeals again tried to find the modern employee’s dilemma in existing Maryland law by distinguishing *Burke* from the case at hand.⁷⁷⁶ The Court of Special Appeals contended

770. *ADM Partnership*, 348 Md. at 97, 702 A.2d at 737. The court stated that in *Schroyer* there was no evidence “to suggest that the plaintiff’s employment was adversely affected and, therefore, we did not address that issue.” *Id.* at 98, 702 A.2d at 737; *see supra* notes 683-693 and accompanying text (discussing the Court of Appeals’s reasoning in *Schroyer*); *see also* *Schroyer v. McNeal*, 323 Md. 275, 592 A.2d 1119 (1991).

771. *Schroyer*, 323 Md. at 288, 592 A.2d at 1125. The court stated that McNeal voluntarily chose to park on the parking lot and to walk across it and the sidewalk, “thus indicating her willingness to accept the risk and relieving the Schroyers of responsibility for her safety.” *Id.*, 592 A.2d at 1126.

772. *ADM Partnership*, 106 Md. App. at 660, 666 A.2d at 880.

773. *See ADM Partnership*, 348 Md. at 87, 702 A.2d at 732 (rejecting the contention that the voluntariness element of the assumption of risk defense is not met when a plaintiff confronts a risk in performing an employment responsibility under the subjective belief “that the failure to fulfill that responsibility may result in adverse economic consequences to her employer and ultimately to herself”).

774. *See supra* notes 743-744 and accompanying text (discussing the validity of the economic coercion argument).

775. *ADM Partnership*, 348 Md. at 98, 702 A.2d at 737.

776. *ADM Partnership*, 106 Md. App. at 661, 666 A.2d at 881; *see supra* notes 675-681 and accompanying text (discussing the facts and the court’s reasoning in *Burke*). The Court of Special Appeals attempted to distinguish *Burke* from the instant case by stating that Martin could not have left her blueprints outside the building and still have completed her task, but the plaintiff in *Burke* could have left the sinks outside the house and still completed his job. *Id.* However, it is possible that Martin could have completed her task at a later point in the day when some of the ice had melted or could have called ADM Partnership, requesting them to come out and retrieve their blueprints, and she still would have completed her assignment. *See ADM Partnership*, 348 Md. at 99, 702 A.2d at 738 (showing that defense counsel made a similar argument). The Court of Appeals even stated that if the court were to accept a subjective belief of adverse economic consequences, *Burke* would have been a stronger case than the one at hand because in *Burke*, “unlike here, the plain-

that the Court of Appeals in *Burke* was deciding "at what point does carrying out an employment responsibility become a voluntary act."⁷⁷⁷ The Court of Appeals correctly denied that this was the proper interpretation of their holding in *Burke*.⁷⁷⁸ Rather, the Court of Appeals stated that its decision in *Burke* found that "there was no evidence to show that [the] plaintiff was not acting on his own volition or free will, or that his employment would have been in jeopardy."⁷⁷⁹ Again, the Court of Special Appeals's reasoning works under the modern employee's dilemma but it finds no basis in Maryland case law. According to Maryland precedent, Martin needed to have more than a subjective belief that she would suffer adverse economic consequences because "the standard to be applied is an objective one."⁷⁸⁰

It appears that what the Court of Appeals was saying in *ADM Partnership*, *Schroyer*, and *Burke* was that for the plaintiff to succeed in demonstrating that she did voluntarily assume the risk she needed to provide objective rather than subjective evidence.⁷⁸¹ Requiring objective evidence may then be considered a watered down version of the modern employee's dilemma or it may just be the standard that assumption of risk has always required.⁷⁸²

b. Adoption of the Modern Employee's Dilemma.—Many courts have adopted the modern employee's dilemma and have abolished the assumption of risk defense in certain employment situations, par-

tiff/delivery-person was specifically asked by the defendant to do the very act that resulted in his injuries." *Id.* at 98, 702 A.2d at 738.

777. *ADM Partnership*, 106 Md. App. at 661, 666 A.2d at 881.

778. *ADM Partnership*, 348 Md. at 98, 702 A.2d at 737.

779. *Id.* The court did state that the *Burke* court drew distinctions between different points of delivery, but it did not suggest "that only the plaintiff's subjective belief that an adverse impact on employment would occur would have been taken as 'evidence' that the plaintiff's acts were not voluntary." *Id.* at 98, 702 A.2d at 738; see *Burke v. Williams*, 244 Md. 154, 158, 223 A.2d 187, 189 (1966) (asserting that there was no "evidence that his job would have been in jeopardy had he left the sink tops on the construction site instead of taking them into the house").

780. *ADM Partnership*, 348 Md. at 98, 702 A.2d at 738 (citing *Schroyer v. McNeal*, 323 Md. 275, 283, 592 A.2d 1119, 1123 (1991)).

781. See *id.* at 100-01, 702 A.2d at 739 (stating that more than subjective evidence is required to show that the plaintiff did act voluntarily); *Schroyer*, 323 Md. at 283, 592 A.2d at 1123 (putting forth that the test is to be an objective one); *Burke*, 244 Md. at 158, 223 A.2d at 189 (concluding that the plaintiff voluntarily confronted the risk because there was no evidence that economic necessity abrogated his violation).

782. See *Gibson v. Beaver*, 245 Md. 418, 421, 226 A.2d 273, 275 (1967) ("In determining whether a plaintiff had knowledge and appreciation of the risk, an objective standard must be applied and a plaintiff will not be heard to say that he did not comprehend a risk which must have been obvious to him.").

ticularly in products liability cases.⁷⁸³ The Court of Appeals should follow the lead of these jurisdictions because the economic basis on which the defense of assumption of risk stands is archaic.⁷⁸⁴ The assumption of risk defense arose in an era in which the main goal of the courts was to give maximum freedom to industry expansion and to ensure complete mobility of labor.⁷⁸⁵ The courts used laissez-faire economics reasoning and based their use of assumption of risk on the understanding that “[s]ince employers in a rapidly industrializing society had to be free to pursue their economic goals, inevitable work

783. See *Rhoads v. Service Mach. Co., Inc.*, 329 F. Supp. 367, 381 (E.D. Ark. 1971) (mem.) (finding that particularly “in a products liability case brought by an injured employee,” the voluntariness with which the employee accepts the risk of injury is “illusory”); *Varilek v. Mitchell Eng’g Co.*, 558 N.E.2d 365 (Ill. App. Ct. 1990) (holding “that a product liability defendant cannot be heard to argue that an injured worker assumed the risk of injury because he had a voluntary choice to make in that he could have chosen not to do his job”); *Cremeans v. Willmar Henderson Mfg. Co.*, 566 N.E.2d 1203, 1207 (Ohio 1991) (holding that in a products liability case, an employee does not voluntarily assume the risk of injury “which occurs in the course of his or her employment when he or she must encounter that risk in the normal performance of his or her required job duties and responsibilities”); *Johnson v. Clark Equip. Co.*, 547 P.2d 132, 140-41 (Or. 1976) (maintaining that in a products liability case involving an employee, it is necessary to take into account the employee’s subjective belief regarding whether he voluntarily faced the risk); *Brown v. Quick Mix Co.*, 454 P.2d 205, 208 (Wash. 1969) (en banc) (holding in a products liability case that an employee whose job requires him to encounter a risk does not do so voluntarily) (citing *Miller v. St. Regis Paper Co.*, 374 P.2d 675 (Wash. 1962) (en banc)).

784. See *Tiller v. Atlantic Coast Line R.R. Co.*, 318 U.S. 54, 71 (1943) (Frankfurter, J., concurring) (asserting that the “common law concept of liability for negligence is archaic and unjust as a means of compensation for injuries sustained by employees under modern industrial conditions”); *Williamson v. Smith*, 491 P.2d 1147, 1149-52 (N.M. 1971) (discussing the evolution of assumption of risk and stating that no longer is assumption of risk necessary to “insulat[e] business from human overhead”); *Cremeans*, 566 N.E.2d at 1205-06 (discussing the historical basis of assumption of risk and stating that due to current economic pressures in the workplace no assumption of risk is required to insulate employers) (citing *Tiller*, 318 U.S. at 59); *North*, *supra* note 671, at 39-44, 65 (outlining the history of assumption of risk and contending that the defense is no longer applicable in the employment setting).

785. See *Tiller*, 318 U.S. at 59 (asserting that the defense of assumption of risk was meant “to insulate the employer as much as possible from bearing the ‘human overhead’ which is an inevitable . . . cost . . . of the doing of industrialized business”); *Williamson*, 491 P.2d at 1149 (stating that assumption of risk evolved to give freedom to expanding industry); *Cremeans*, 566 N.E.2d at 1205 (“The defense of assumption of risk is a product of laissez-faire economics and evolved in master and servant cases.” (citing *Williamson*, 491 P.2d at 1149)); *KEETON ET AL.*, *supra* note 723, § 80, at 568-69 (stating that the defense was based on the economic theory “that there was complete mobility of labor, that the supply of work was unlimited, and that the worker was an entirely free agent, under no compulsion to enter into the employment”); *North*, *supra* note 671, at 38 (asserting that the judge made defense based on individualism and “the subsidization of a rapidly expanding industrial sector”).

place injuries could not be allowed to impede the process.”⁷⁸⁶ Therefore, an employee accepted all the known risks of employment and was able to leave her employment whenever she felt the need to abandon it.⁷⁸⁷ The defense of assumption of risk is no longer necessary to protect expanding industry because the defense’s original intentions work against the social and legal policy of the employer providing the employee with a reasonably safe place to work.⁷⁸⁸ For example, in *Williamson v. Smith*,⁷⁸⁹ the Supreme Court of New Mexico asserted that:

insulating business from human overhead, however valid it may have been during the moment of the industrial revolution, now runs directly counter to current social policy . . . [and] the concept of assumption of risk is one hundred eighty degrees out of phase with our legal policy of requiring the employer to provide his employees with a reasonably safe place to work.⁷⁹⁰

Additionally, the assumption of risk defense neglects the economic compulsion that compels an employee to work.⁷⁹¹ The Supreme Court of Ohio, in *Cremeans*, stated that “the economic pressures associated with the reality of today’s workplace inevitably came to bear on [the employee’s] decision to encounter the risk.”⁷⁹²

The Court of Appeals appears reluctant to eradicate the defense of assumption of risk, even though it has become an “anachro-

786. North, *supra* note 671, at 40. Laissez-faire economics is the belief that the economy is at its optimum when the government does not interfere with the workings of the market. *Id.* at 39.

787. See, e.g., *Cremeans*, 566 N.E.2d at 1206 (contending that “a worker was viewed as an entirely free agent not compelled to enter into a particular employment relationship” (citing *KEETON ET AL.*, *supra* note 723, § 80, at 568-69)); North, *supra* note 671, at 65 (“The decision to abolish assumption of risk in the employment setting is grounded in economic reality and a sense of humanity consistent with present social policy.”).

788. See *Cremeans*, 566 N.E.2d at 1206-07 (contending that assumption of risk defense in employment situations is against public policy); *Siragusa v. Swedish Hosp.*, 373 P.2d 767, 773 (Wash. 1962) (en banc) (“No longer can it be said that a judicially-imposed doctrine of assumption of risk is necessary or desirable to protect expanding industry from being crippled by employers’ responsibility for tortious conduct toward their employees.”). The *Siragusa* court also asserted that it was well established that an employer has the legal duty “to furnish his employees a reasonably safe place to work, and the task of citing all the cases which have announced this rule would be overbearing.” *Id.* at 771.

789. 491 P.2d 1147 (N.M. 1971).

790. *Id.* at 1150.

791. See *supra* note 709 and accompanying text.

792. *Cremeans*, 566 N.E.2d at 1208; see also *KEETON ET AL.*, *supra* note 723, § 80, at 568 (stating that relieving employer liability based upon the theory that an employee is free to leave employment at any time disregards “[t]he economic compulsion which left [the employee] no choice except starvation”).

nism,”⁷⁹³ because the modern employee’s dilemma is based upon the employee’s subjective,⁷⁹⁴ rather than objective,⁷⁹⁵ belief that she will suffer adverse economic consequences. However, a subjective belief is substantive enough to demonstrate that an employee did not act voluntarily.⁷⁹⁶ In *Varilek*, an Illinois appellate court concluded that objective evidence is not necessary due to the “competitiveness and pragmatism of the real world” which makes the fear of being fired “not the only sanction or detriment that workers suffer if they refuse to do their jobs.”⁷⁹⁷ The court continued by saying that “[t]here are many other sanctions and detriments that are not expressed or immediately imposed that workers suffer if they choose not to do their jobs,” but the court did not specify what they are.⁷⁹⁸

However, the Supreme Court of Oregon in *Johnson v. Clark Equipment Co.*⁷⁹⁹ noted that other sanctions may include an employee’s “fear that a slowdown in his individual production would slow down the entire production team and thereby draw attention of his boss” and this situation would be particularly detrimental to the employee if he has a history of such slowdowns.⁸⁰⁰ Additionally, if the job market is tight, the employee may fear he will be unable to find a job.⁸⁰¹ These sanctions and economic compulsion make an employee’s subjective belief sufficient and the voluntary element of assumption of risk virtually unsatisfiable in employment settings.⁸⁰²

793. See North, *supra* note 671, at 65 (concluding that “in the face of increasing numbers of work-related injuries, courts should eliminate the [assumption of risk defense] as an anachronism”).

794. See *Varilek v. Mitchell Eng’g Co.*, 558 N.E.2d 365, 376 (Ill. App. Ct. 1990) (acknowledging that the plaintiff did not provide objective evidence that he would have lost his job if he had not encountered the risk because such evidence is not necessary to prove that the decision was voluntary).

795. See *ADM Partnership*, 348 Md. at 98, 702 A.2d at 738 (stating that the standard should be objective) (citing *Schroyer v. McNeal*, 323 Md. 275, 283, 592 A.2d 1119, 1123 (1991)).

796. See *Varilek*, 558 N.E.2d at 376 (“[A]n injured worker does not have to put in evidence that he would have been fired if he had not done his job in order to show that his decision to use the defendant’s product was not voluntary under the doctrine of assumption of risk.”); North, *supra* note 671, at 49 (“It is questionable whether a purely voluntary assumption of risk can ever occur when a worker is carrying out an assigned task.”).

797. *Varilek*, 558 N.E.2d at 376.

798. *Id.*

799. 547 P.2d 132 (Or. 1976).

800. *Id.* at 140-41.

801. *Id.* at 141.

802. See *Rhoads v. Service Mach. Co., Inc.*, 329 F. Supp. 367, 381 (E.D. Ark. 1971) (mem.) (“The ‘voluntariness’ with which a worker assigned to a dangerous machine in a factory ‘assumes the risk of injury’ from the machine is illusory.”).

c. *Application of the Modern Employee's Dilemma in ADM Partnership.*—Although the modern employee's dilemma should be adopted by the Court of Appeals, the facts of *ADM Partnership* appear too far down that feared "slippery slope" to apply the doctrine in this case. In other words, for this doctrine to work effectively, a boundary must be established, or employees could use the doctrine for any minor infliction sustained during the course of employment. This doctrine operates most effectively in strict products liability lawsuits and not slip and fall cases such as the present one.⁸⁰³ For example, it is reasonable to argue that after falling once, Martin could have gotten back into her truck, driven to the nearest phone, and asked ADM Partnership to send an employee out to meet her at her truck and to pick up the documents.⁸⁰⁴ Martin would have been able to complete her task without injury and without fear of losing her job. The existence of a reasonable alternative to a rarely encountered risk, as was the case here, demonstrates why the modern employee's dilemma should not apply in most slip and fall cases. However, this case is different from products liability lawsuits where employees routinely encounter dangerous situations.⁸⁰⁵ For example, in *Varilek*, a products liability case, the employee had to encounter oil-covered panels on a daily basis; this was the only manner in which he could complete his job.⁸⁰⁶ The employee in *ADM Partnership* did not have to confront the

803. North, *supra* note 671, at 37 (stating that "strict products liability lawsuits" require "judicial re-examination of the use of assumption of risk in the employment context" because workers' compensation laws protect employers from "employees' tort actions" but these payments are small so "injured workers often look to manufacturers for redress of work-related injuries and diseases"). The article also notes that proponents of the use of the assumption of risk defense in products liability cases could "argue that in the context of the present products liability explosion, mass torts have the same potential for destroying industry that industrial torts were perceived to have had in the late nineteenth century." *Id.* at 64. However, the author also notes that the courts decide who is "better situated to bear loss of injury" and how best to serve society, and in so doing, the "trend has been to require manufacturers to bear the cost of injuries as part of their production costs." *Id.* at 65.

804. See *ADM Partnership*, 348 Md. at 99-100, 702 A.2d at 738 (noting that the defense counsel argued that Martin could have called her employer upon realizing the icy conditions and Martin admitting that she could have).

805. In addition to products liability cases, another plausible employment setting in which the doctrine may be employed is with regard to construction workers. See *Kitchens v. Winter Co. Builders, Inc.*, 289 S.E.2d 807, 809 (Ga. Ct. App. 1982) ("It goes without saying that all construction work is dangerous and if we applied the doctrine of assumption of the risk . . . there would be no construction work, as all employees would immediately be required to walk off the job or assume the risk of injury . . .").

806. *Varilek*, 558 N.E.2d at 375. The Illinois appellate court stated that under the circumstances this was the only method by which the panels could be installed and thus "it is plain that the plaintiff was compelled to accept the risk of walking on the panels in order to exercise and protect his right and privilege to do his job. His only alternative was not to

ice to deliver the blueprints, nor did she routinely have to encounter icy or dangerous conditions to complete her daily employment obligations.⁸⁰⁷ Therefore, the modern employee's dilemma doctrine should be applied on a case-by-case basis and should be invoked in cases where the circumstances dictate that the employee had to face the risk consistently to complete his task and could not complete the job without facing the risk.⁸⁰⁸

Additionally, the public policy reasons for abolishing assumption of risk in products liability cases are much stronger than in slip and fall cases. The *Varilek* court stated that this was so because "virtually everyone in the work force of our society uses some manufactured product in the regular course of their job" and "work-related product liability injuries are ordinarily grave and often permanent and devastating to the worker and his family."⁸⁰⁹ The court's statement does not stretch to include slip and fall cases such as Martin's because Martin did not fall on the ice because of a manufactured product with which she had daily contact during the performance of her job. Thus, an employee should not be barred in a products liability suit from recovering a just amount for his injuries because "of a specious argument that he had an election and voluntarily assumed the risk of being injured by doing his job."⁸¹⁰ In *ADM Partnership*, however, Martin did not come into contact with a manufactured product that caused her injury.⁸¹¹ Allowing the use of the modern employee's dilemma doctrine in slip and fall cases such as *ADM Partnership* could open the door to abuse of the doctrine. Notwithstanding this possibility, the Court of Appeals should not dictate that an employee who slips and

do his job." *Id.*; see *Johnson v. Clark Equip. Co.*, 547 P.2d 132, 140 (Or. 1976) (abolishing assumption of risk defense in products liability cases); *Rhoads*, 329 F. Supp. at 381 (abrogating assumption of risk defense in products liability cases).

807. See *supra* note 804.

808. The Supreme Court of Oregon in *Johnson v. Clark Equipment Co.* stated that when considering whether it was reasonable for an employee to decide to encounter a known risk, it is necessary to consider the employee's motivation, the pressures on the employee, and the amount of time he had to make the decision. *Johnson*, 547 P.2d at 140. Additionally, "working conditions and related circumstances are a particularly relevant consideration" in determining the reasonableness of the employee's actions because such factors have a strong influence on the employee's actions. *Id.*

809. *Varilek*, 558 N.E.2d at 376. The court asserted that the "socio-legal responsibilities mandate that the law sees to it that these injured workers are not unjustly deprived of recovering fully for their injuries." *Id.*

810. *Id.*

811. *ADM Partnership*, 348 Md. at 88 n.1, 702 A.2d at 732 n.1; North, *supra* note 671, at 37 ("Employers are generally insulated from employees' tort actions by workers' compensation laws, and workers' compensation payments are generally conceded to be minimal at best; hence, injured workers often look to manufacturers for redress of work-related injuries and diseases." (footnotes omitted)).

falls during the course of employment should never be able to use the modern employee's dilemma to counteract the assumption of risk defense. Rather, the court should offer a list of factors that the trial courts should utilize on a case-by-case basis. Factors should include whether it is a products liability case, the hazards of the employee's job, the frequency the employee comes in contact with the danger, the severity of the injury sustained, the ability of the employee to recover a sufficient amount under workers' compensation statutes, and under what circumstances the employee was working.

5. *Conclusion.*—The Court of Appeals correctly decided *ADM Partnership v. Martin* because, following Maryland precedent, the modern employee's dilemma does not apply to the facts of this case. However, in future employment cases, particularly those where economic coercion can be shown, the court should apply the modern employee's dilemma and abrogate the use of the assumption of risk defense, because the economic basis for the defense is no longer applicable in today's economy. The court will then be able to protect an employee's freedom of choice from the constraints of economic coercion.

JENNIFER K. SQUILLARIO

Recent Decisions

The United States Court of Appeals for the Fourth Circuit

I. CONSTITUTIONAL LAW

A. *Curricular Choice and the Constitution: Conflicting Views of Teacher Free Speech Rights*

In *Boring v. Buncombe County Board of Education*,¹ the United States Court of Appeals for the Fourth Circuit held that a teacher's selection and production of a school play was not protected speech under the First Amendment.² The court reasoned that the teacher's selection and production of the play did not involve a matter of public concern, and therefore was not subject to First Amendment protection.³ The court further reasoned that because the play was part of the school curriculum,⁴ even if the teacher's selection and production of the play was "speech" protected by the First Amendment, the school authorities had a "legitimate pedagogical interest" in restricting that "speech."⁵ In so holding, the court confused the general issue of the freedom of a public employee to speak on a matter of public concern with the more specific issue of the freedom of a teacher to make curricular decisions in public schools. As a result, the court failed to adopt a clear standard for analyzing teacher curricular speech in the public schools. Furthermore, although the court's affirmance of the school's right to control the curriculum⁶ followed Supreme Court precedent,⁷ the Fourth Circuit's limited inquiry into the basis of the school's restrictions may be used by later courts to place further limitations on the ability of teachers to make curricular decisions.

1. 136 F.3d 364 (4th Cir.) (en banc), *cert. denied*, 119 S. Ct. 47 (1998).

2. *Id.* at 367. The First Amendment states in relevant part: "Congress shall make no law . . . abridging the freedom of speech" U.S. CONST. amend. I.

3. *Boring*, 136 F.3d at 368.

4. *Id.*

5. *Id.* at 370. Pedagogical means "'of or relating to teaching or pedagogy. EDUCATIONAL.'" *Id.* (quoting WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1663 (1971)).

6. *See id.* at 370-71.

7. *See infra* Part 2.b (discussing Supreme Court precedent regarding a school's right to control the school curriculum).

1. *The Case*.—During the fall of 1991, Margaret Boring, a teacher at Charles D. Owen High School in Buncombe County, North Carolina, selected the play *Independence* to be performed by her advanced acting class in an annual statewide competition.⁸ Boring described the play as “‘powerfully depict[ing] the dynamics within a dysfunctional, single-parent family—a divorced mother and three daughters; one a lesbian, another pregnant with an illegitimate child.’”⁹ Boring alleged that she provided the school principal with the name of the play, but apparently did not give him any other information about it.¹⁰

The play won several awards in a regional competition and was to be performed in the state finals.¹¹ Before performing the play at the state finals, the four student-actors performed a scene from the play in front of an English class at the school.¹² After the performance, a parent of one of the students in the class complained to the school principal.¹³ The principal then read the script and initially decided that the students could not perform the play at the state competition.¹⁴ He eventually agreed, however, to allow them to perform the play at the state competition with certain parts excluded.¹⁵

In June 1992, the principal requested that Margaret Boring be transferred from Owen High School on the basis of “‘personal conflicts resulting from actions she initiated during the course of th[e] school year.’”¹⁶ The transfer was approved by the superintendent on the basis that Boring had not followed the school’s “controversial materials policy” in producing the play.¹⁷ Boring alleged that school dramatic productions were not included in the policy at the time of the production at issue, but that they were added subsequently.¹⁸ Bor-

8. *Boring*, 136 F.3d at 366.

9. *Id.* (quoting Plaintiff’s Amended Complaint).

10. *Id.* Boring alleged that she notified the principal each year of her play selection. *Id.*

11. *Id.*

12. *Id.* Because the play contained “mature subject matter,” Boring suggested that the teacher obtain permission from parents of the students in the English class before they watched the play. *Id.*

13. *Id.*

14. *Id.*

15. *Id.* The court assumed that the performance at the state competition followed the principal’s instructions. *Id.* The students won second place at the state competition. *Id.*

16. *Id.* at 366-67. In addition to the play, Boring and the school principal had a confrontation during the spring of 1992 regarding the stage floor in the auditorium and construction of sets for a musical production.

17. *Id.* at 367.

18. *Id.*

ing appealed her transfer to the Board of Education (Board), which upheld the transfer.¹⁹

Boring filed suit,²⁰ alleging, among other things, that her transfer “was in retaliation for expression of unpopular views through the production of the play and thus in violation of her right to freedom of speech under the First and Fourteenth Amendments.”²¹ The United States District Court for the Western District of North Carolina dismissed all of Boring’s claims for failure to state a claim upon which relief can be granted.²² The district court held that Boring’s transfer as a result of the selection and production of the play did not violate the First Amendment because she did not engage in protected speech.²³ The court reasoned that the speech was not protected because she was not disciplined for ideas she expressed, but rather for ideas the play expressed.²⁴ In addition, the district court held that even if the selection of the play was protected speech, the school officials had a “‘legitimate [pedagogical] interest’” in restricting Boring’s speech.²⁵

Boring appealed the dismissal of her federal First Amendment claim to the United States Court of Appeals for the Fourth Circuit.²⁶ The Fourth Circuit, in a divided panel opinion, reversed and remanded the district court’s dismissal of the First Amendment claim.²⁷ The court held that the district court erred in holding that the First Amendment protects only original expression and does not protect expression based on another person’s ideas, such as the ideas expressed in a school play.²⁸ The court also held that although the

19. *Id.*

20. Boring filed suit in state court, but the defendants removed the case to federal court. *Boring v. Buncombe County Bd. of Educ.*, 98 F.3d 1474, 1476-77 (4th Cir. 1996), *vacated and reh’g granted en banc*, No. 95-2593 (4th Cir. Dec. 3, 1996), *reh’g en banc*, 136 F.3d 364 (4th Cir.), *cert. denied*, 119 S. Ct. 47 (1998).

21. *Boring*, 136 F.3d at 367. Additionally, Boring claimed a violation of her right to due process under the Fourteenth Amendment based on her allegation that school board members used information not disclosed at the hearing in making their decision. *Id.* Boring also brought these claims, as well as a claim for violation of her liberty interest, under the North Carolina Constitution. *Id.*

22. *Id.*

23. *Id.*

24. *Boring*, 98 F.3d at 1477.

25. *Id.* The Supreme Court first held that a school could restrict student speech if the restrictions were related to legitimate pedagogical concerns in *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260, 273 (1988).

26. *Boring*, 136 F.3d at 367.

27. *Id.*

28. *See Boring*, 98 F.3d at 1478 (“[T]he First Amendment protects speech, regardless of whether the speaker originally generates the communication or personally advocates the ideas contained therein.”).

Board may have had legitimate pedagogical reasons for restricting the play, none were stated on the record, and thus the district court was premature in its dismissal.²⁹ In so holding, the court agreed with the district court's use of the "legitimate pedagogical concern" standard adopted in *Hazelwood School District v. Kuhlmeier*³⁰ for restricting teacher classroom speech, but reasoned that the district court failed to apply it properly.³¹ In addition, the court rejected the Board's argument that it was necessary for Boring to establish that the production and selection of the play related to a matter of public concern in order for the play to constitute protected speech.³²

The panel decision was vacated by order of the en banc court, which granted rehearing en banc to address whether Boring, a public high school teacher, had a First Amendment right to participate in the makeup of the school curriculum through the selection and production of a school play.³³

2. *Legal Background.*—The United States Supreme Court has stated that "[t]he vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools."³⁴ A heightened recognition of First Amendment rights in the context of the public schools began in the mid-twentieth century.³⁵ During this time, the constitutional foundation for freedom of speech in academic realms was grounded in the notion that the First Amendment

29. *Id.* at 1479.

30. 484 U.S. 260, 273 (1988); see *supra* note 25 and accompanying text (noting the district court's use of the *Hazelwood* standard).

31. *Boring*, 98 F.3d at 1483.

32. *Id.* at 1479.

33. *Boring*, 136 F.3d at 367. Orders for rehearing en banc are not common. DAVID G. KNIBB, FEDERAL COURT OF APPEALS MANUAL § 31.11, at 597 (3d ed. 1997) (noting that in the Fifth Circuit "less than 1 per cent of all cases decided . . . are reheard in banc"). The Federal Rules of Appellate Procedure provide: "Such a hearing or rehearing is not favored and ordinarily will not be ordered except (1) when consideration by the full court is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance." FED. R. APP. P. 35(a). A rehearing en banc does not involve review of the panel's prior decision. KNIBB, *supra*, § 31.11, at 602. The panel opinion is a nullity. *Id.* Rather, the en banc court reviews the district court's decision. *Id.*

34. *Shelton v. Tucker*, 364 U.S. 479, 487 (1960).

35. See *Epperson v. Arkansas*, 393 U.S. 97, 107 (1968) (holding that a state's right to choose the curriculum for its schools does not include the right to restrict the teaching of a "scientific theory or doctrine" when the reasons behind the restriction violate the First Amendment); *Shelton*, 364 U.S. at 480-81, 490 (holding invalid a statute that required teachers, as a condition of employment in a state school, to file a list of all organizations they were members of during the previous five years); *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943) (holding that students could not be compelled to participate in the Pledge of Allegiance).

“does not tolerate laws that cast a pall of orthodoxy over the classroom.”³⁶ However, recent Supreme Court decisions have demonstrated that courts must balance the government’s interest in providing a quality education to its citizens against the individual First Amendment rights of teachers and students.³⁷ The Court has addressed both the rights of teachers, as public employees, to comment on matters of public concern, as well as the First Amendment rights of students and teachers within the context of the school curriculum. The instances in which these two analyses have overlapped have been explored by the lower courts.

a. *Control of Public Employee Speech*—*Pickering and its Progeny*.—Beginning with the landmark case of *Pickering v. Board of Education*³⁸ in 1968, the Supreme Court adopted a new test for characterizing the speech of public employees on matters of public concern. The Court in *Pickering* held that a teacher’s First Amendment rights had been violated when she was dismissed from her teaching position for writing a letter to a newspaper in which she criticized school funding issues.³⁹ The Court adopted a balancing approach in which “the interests of the teacher, as a citizen, in commenting upon matters of public concern” would be balanced against “the interest of the State, as an employer, in promoting the efficiency of the public service it performs through its employees.”⁴⁰ In applying this approach, the Court found that the issue of school funding was a matter

36. *Keyishian v. Board of Regents*, 385 U.S. 589, 603, 609-10 (1967) (holding that membership in an organization, such as the Communist party, without the specific intent to further the unlawful aims of the organization, could not disqualify an individual from public school employment).

37. See *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 273 (1988) (holding that school officials may restrict student speech “so long as their actions are reasonably related to legitimate pedagogical concerns”); *Bethel Sch. Dist. v. Fraser*, 478 U.S. 675, 681 (1986) (stating that “[t]he undoubted freedom to advocate unpopular and controversial views in schools and classrooms must be balanced against the society’s countervailing interest in teaching students the boundaries of socially appropriate behavior”); *Board of Educ. v. Pico*, 457 U.S. 853, 864 (1982) (plurality opinion) (stating that “the discretion of the States and local school boards . . . must be exercised in a manner that comports with the transcendent imperatives of the First Amendment”); *Tinker v. Des Moines Indep. Community Sch. Dist.*, 393 U.S. 503, 511 (1969) (holding that a student’s speech is protected unless it can be shown that the speech would cause a “material and substantial interference with schoolwork or discipline”).

38. 391 U.S. 563 (1968).

39. *Id.* at 564-65.

40. *Id.* at 568. In adopting this balancing test, the Court acknowledged that although public employees do enjoy First Amendment protection, the interests of the government in controlling the speech of its employees differ from the interests the government has in the regulation of the speech of the general public. *Id.*

of public concern and that teachers are the "members of the community" best able to provide opinions on the issue.⁴¹ Furthermore, the teacher's speech did not interfere with the school's operation or affect her performance.⁴² The *Pickering* Court thus recognized a public employee's right to freedom of speech on a matter of public concern, but concluded that this right had to be balanced against the government's interest in an efficient workplace.⁴³

Fifteen years later, the balancing approach announced in *Pickering* was applied to a non-school setting in *Connick v. Myers*.⁴⁴ In this 5-4 opinion, the Court upheld the discharge of an assistant district attorney who distributed a questionnaire to her coworkers concerning office operations and morale.⁴⁵ The Court reaffirmed its holding in *Pickering*, but held that public employee speech must involve a matter of public concern, rather than a matter of private interest to the employee, in order to afford it First Amendment protection.⁴⁶ Because the questions on the office survey, with one exception, involved a workplace dispute, the Court held that the questions did not involve a

41. *Id.* at 571-72.

42. *Id.* at 572-73.

43. *See id.* at 568. Even if the speech is found to be constitutionally protected, it is still possible for an adverse employment decision to be upheld. In *Mount Healthy City School District Board of Education v. Doyle*, 429 U.S. 274 (1977), the Court established a test for determining whether an adverse employment decision violates a public employee's First Amendment rights. First, the employee must show that his speech was constitutionally protected based on the standard set forth in *Pickering*. *Id.* at 284, 287. After this determination the employer has the burden of showing that it "would have reached the same decision . . . even in the absence of the protected conduct." *Id.* at 287. Thus, the fact that speech deserving constitutional protection under the *Pickering* balancing test speech may have been involved in a discharge decision does not automatically indicate that the discharge was improper. *See id.* at 284. The *Mt. Healthy* Court, after determining that an employee's speech was protected under the *Pickering* balancing test, held that an employer should not be "precluded, because it considered constitutionally protected conduct in deciding not to rehire Doyle, from attempting to prove . . . that quite apart from such conduct Doyle's record was such that he would not have been rehired in any event." *Id.* at 286. The *Mt. Healthy* test has also been applied to more recent decisions that have adopted standards other than *Pickering* to determine whether the speech is constitutionally protected. *See, e.g.,* *Ward v. Hickey*, 996 F.2d 448, 452 (1st Cir. 1993) (applying *Mt. Healthy* to determine whether a school committee's decision to deny reappointment to a teacher because of her classroom discussion of abortion of Down's Syndrome fetuses violated her First Amendment rights); *Miles v. Denver Pub. Sch.*, 944 F.2d 773, 775 (10th Cir. 1991) (applying *Mt. Healthy* to establish whether a teacher's First Amendment rights were violated when he was placed on administrative leave and issued a letter of reprimand for comments made to his class regarding a rumor about two students engaging in sexual intercourse on the school tennis court).

44. 461 U.S. 138 (1983).

45. *Id.* at 140, 154.

46. *Id.* at 146-47. The Court noted that this holding does not mean that private speech "is totally beyond the protection of the First Amendment." *Id.* at 147.

matter of public concern.⁴⁷ Furthermore, the Court stated that if the public employee's speech was not on a matter of public concern, there would be no need to "scrutinize the reasons for her discharge."⁴⁸ Because one of the survey questions involved a limited matter of public concern, the Court did conduct a limited inquiry into the reasons for the assistant district attorney's discharge, but concluded that the government's interest in an efficient workplace defeated her First Amendment claim.⁴⁹ Thus, the *Connick* Court "narrowed the circumstances under which public employees can prevail in free expression cases"⁵⁰ by making a clear distinction between speech on matters of public concern, to which the *Pickering* standard would be applied, and speech that is personal and private, to which the standard would not be applied and to which First Amendment protection would not be extended under these circumstances.⁵¹

The Fourth Circuit applied the standards set forth in *Pickering* and *Connick* in *Piver v. Pender County Board of Education*.⁵² In this 1987 case, a teacher claimed that he had been reassigned to another school

47. *Id.* at 148. The determination of whether an employee's speech involves a matter of public concern is based on the "content, form, and context of a given statement, as revealed by the whole record." *Id.* at 147-48. The Court found that one of the questions on the questionnaire, asking coworkers whether they felt pressure to participate in political campaigns, involved a limited matter of public concern. *Id.* at 149.

48. *Id.* at 146. The Court went on to hold:

when a public employee speaks not as a citizen upon matters of public concern, but instead as an employee upon matters only of personal interest . . . a federal court is not the appropriate forum in which to review the wisdom of a personnel decision taken by a public agency allegedly in reaction to the employee's behavior.

Id. at 147.

49. *See id.* at 154 (concluding that "[t]he limited First Amendment interest involved here does not require that [an employer] tolerate action which he reasonably believed would disrupt the office, undermine his authority, and destroy close working relationships").

50. MARTHA M. MCCARTHY ET AL., PUBLIC SCHOOL LAW 274 (4th ed. 1998).

51. *Id.* McCarthy also notes that under *Connick*, a court may apply the *Pickering* balancing test's assessment of the speech's effect on government interests to its initial determination of whether the speech relates to a matter of public or private concern. *Id.* The *Connick* Court, in its determination of whether the speech on the questionnaire involved a matter of public concern, stated that "[t]he *Pickering* balance requires full consideration of the government's interest in the effective and efficient fulfillment of its responsibilities to the public. . . . We agree . . . that there is no demonstration here that the questionnaire impeded Myers' ability to perform her responsibilities." *Connick*, 461 U.S. at 150-51; *see supra* note 47 and accompanying text (discussing other factors the Court considered in its determination of whether or not the speech was on a matter of public concern). It should also be noted that the *Connick* Court does not suggest that speech not on a matter of public concern is "totally beyond the protection of the First Amendment" if it occurs in a setting that affords it protection, such as a public street. *Connick*, 461 U.S. at 147.

52. 835 F.2d 1076 (4th Cir. 1987).

in violation of his First Amendment rights for speaking out in support of tenure for his principal.⁵³ The court first determined that the speech was on a matter of public concern and was thus constitutionally protected, because the teacher spoke about an issue that was of interest to the community, particularly to the parents of students.⁵⁴ Second, the court found that the public's interest in the speech outweighed any threat of "turmoil" at the school.⁵⁵ The Fourth Circuit's decision demonstrated the need for schools to provide more proof of disruption to the classroom than the mere threat of "turmoil" at the school.⁵⁶ More importantly, it emphasized that teachers are entitled to some First Amendment protection when speaking on matters of public concern.⁵⁷

b. Control of Speech in the Public Schools—Adding Curriculum to the Equation.—The First Amendment rights of students in the context of curricular, "school-sponsored" speech have also been addressed by the Supreme Court in recent years. The Court's landmark decision in *Tinker v. Des Moines Independent Community School District*⁵⁸ was considered a major step towards the recognition of First Amendment rights in public schools.⁵⁹ In this 1969 opinion, the Court held that students had the right to wear armbands on school grounds as a form of peaceful, symbolic protest of the Vietnam War, as long as their acts did not substantially interfere with the educational process or with the rights of others.⁶⁰ In extending students' First Amendment protections, however, the Court acknowledged the authority of school officials to

53. *Id.* at 1077.

54. *Id.* at 1080.

55. *Id.* at 1081. The court found the threat of turmoil to be insufficient when weighed against the public's interest in hearing from a teacher who had particular knowledge of the principal's performance. *See id.* ("Although discipline and harmony in the workplace are factors mentioned in *Pickering* and *Connick*, the threat to those values presented by [the teacher] was clearly less worrisome than the interests trampled by the reprisal against [the teacher].").

56. *See id.*

57. *See id.*; *see also* Jennifer Turner-Egner, Commentary, *Teachers' Discretion in Selecting Instructional Materials and Methods*, 53 EDUC. L. REP. 365, 378 (1989) ("Deference to school boards, however, does not mean elimination of teachers' rights to freedom of expression; the recent decision[] in *Piver* . . . show[s] that teachers are not without protection.").

58. 393 U.S. 503 (1969).

59. *See* Derrick E. Cox, Commentary, *A School Board's Power to Make Curriculum Decisions*, 60 EDUC. L. REP. 1041, 1041 (1990) (asserting that "broad First Amendment rights" were granted to students by the Supreme Court's landmark decision in *Tinker*); *see also* *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 266 (1988) (citing *Tinker* as establishing the principle that students have rights regarding freedom of speech or expression on school premises).

60. *Tinker*, 393 U.S. at 513-14.

control conduct in the public schools.⁶¹ Although the case involved the protection of student speech, the Court also recognized the rights of teachers, noting that “[i]t can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.”⁶²

Similarly, in *Board of Education v. Pico*,⁶³ the Court expanded the First Amendment rights of students when it held that local school boards could not remove books from school libraries solely because the board members might disagree with the ideas expressed in the books.⁶⁴ The Court again noted, however, that school authorities maintain broad discretion in managing the school curriculum.⁶⁵

Six years after the *Pico* decision, in *Hazelwood School District v. Kuhlmeier*,⁶⁶ the Supreme Court expanded the authority of school officials to exercise control over the school curriculum. In a 5-3 opinion, the Court held that school officials did not violate the First Amendment rights of students by deleting two articles from the school’s newspaper.⁶⁷ The first article discussed the pregnancy experiences of three students at the school.⁶⁸ The second article described the impact of divorce on school students.⁶⁹ In so holding, the Court announced a new standard for analyzing student speech occurring in the context of school-sponsored curricular activities such as student newspapers and theatrical productions that “bear the imprimatur of

61. *Id.* at 507 (citing *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968); *Meyer v. Nebraska*, 262 U.S. 390, 402 (1923)). The Court in *Epperson*, although recognizing that First Amendment rights exist in the public schools, nevertheless stressed the importance of exercising judicial restraint in this area, stating that “[b]y and large, public education in our Nation is committed to the control of state and local authorities.” *Epperson*, 393 U.S. at 104; see also *supra* note 37 and accompanying text.

62. *Tinker*, 393 U.S. at 506.

63. 457 U.S. 853 (1982) (plurality opinion).

64. *Id.* at 872.

65. See *id.* at 869. The Court distinguished between the school library, which is used voluntarily by the students and to which the school board should exercise limited discretion, and the school curriculum, to which the school board may well have “absolute discretion.” *Id.* Following the Court’s decision in *Pico*, the Court reiterated the discretion owed to school boards in *Bethel School District No. 403 v. Fraser*, 478 U.S. 675 (1986). The Court, in holding that a student’s “lewd and indecent speech” at a school assembly was beyond the protection of the First Amendment, stated that “[t]he determination of what manner of speech in the classroom or in school assembly is inappropriate properly rests with the school board.” *Id.* at 683, 685.

66. 484 U.S. 260 (1988).

67. *Id.* at 276.

68. *Id.* at 263.

69. *Id.*

the school.”⁷⁰ Educators, the Court held, do not violate the First Amendment by placing restrictions on student school-sponsored speech if the restrictions are “reasonably related to legitimate pedagogical concerns.”⁷¹ It is only when the restrictions have “no valid educational purpose” that First Amendment rights are violated.⁷² Pedagogical concerns include the potential for the speech to “substantially interfere” with the proper functioning of the school.⁷³ Concerns specifically noted by the Court include the speech’s suitability for immature audiences, the quality of the speech, its advocacy of inappropriate conduct, and its propensity to associate the school with some prejudicial position.⁷⁴ The Supreme Court’s decision in *Hazelwood* gave school officials heightened authority to regulate student curricular speech.

c. *The Application of Connick and Hazelwood to Teacher Curricular Speech.*—Several federal circuit courts have applied the *Hazelwood* analysis to curricular decisions in public schools that have not involved adverse employment action. The analysis has been applied to a decision by school administrators to prohibit a teacher from reading from the Bible during class and keeping religious books in his classroom library,⁷⁵ to a decision to remove a humanities textbook

70. *Id.* at 271. The Court distinguished *Tinker*, stating that *Tinker* involved the school’s “tolerat[ion]” of student speech that occurred on school grounds while this case involved the school’s “promot[ion]” of student speech within school-sponsored activities. *Id.* at 270-71. The Court stated three reasons for giving school officials heightened control over school-sponsored student speech: (1) to ensure that students learn the appropriate lessons; (2) to ensure that the speech is appropriate for the maturity level of the audience; and (3) to ensure that the views expressed are not wrongly attributed to the school. *Id.* at 271.

71. *Id.* at 273; see *supra* note 5 and accompanying text (defining “pedagogical”).

72. *Hazelwood*, 484 U.S. at 273.

73. *Id.* at 271 (quoting *Tinker v. Des Moines Indep. Community Sch. Dist.*, 393 U.S. 503, 509 (1969)).

74. *Id.* at 271-72. The Court found that the principal’s concerns over protecting the privacy of the individuals mentioned in the article and the appropriateness of the article for young audiences justified deleting the articles. *Id.* at 276.

75. *Roberts v. Madigan*, 921 F.2d 1047, 1056-57 (10th Cir. 1990) (finding that because the teacher’s conduct was “prompted by a religious purpose” and may be perceived to bear “the imprimatur of the school,” then the activity was properly prohibited (quoting *Hazelwood*, 484 U.S. at 271)).

from a high school curriculum,⁷⁶ and to a decision to place restrictions on participation in a school's career day.⁷⁷

A number of the circuits have also discussed the application of *Hazelwood* and *Connick* to the analysis of teacher curricular speech in the context of an adverse employment decision. In *Kirkland v. Northside Independent School District*,⁷⁸ the United States Court of Appeals for the Fifth Circuit held that a teacher's use of an unapproved reading list was not entitled to First Amendment protection, and further, that the school board's decision not to renew his employment contract involved "nothing more than an ordinary employment dispute."⁷⁹ Although the Fifth Circuit discussed both *Hazelwood* and *Connick* in its decision, it chose to adopt the *Connick* standard for analyzing the teacher's speech.⁸⁰ In contrast, in *Miles v. Denver Public Schools*,⁸¹ the United States Court of Appeals for the Tenth Circuit applied *Hazelwood* to determine that a teacher's free speech rights were not violated when he was placed on paid administrative leave and issued a reprimand letter for comments he made during class about two students engaging in sexual intercourse on the school tennis court.⁸² In so holding, the Tenth Circuit rejected the analysis articulated in *Connick* relating to employee speech in "a more general public setting" in favor of the *Hazelwood* standard for reviewing restrictions on "classroom speech."⁸³ Most recently, the Eighth Circuit, in *Lacks v. Ferguson Reorganized School District*,⁸⁴ applied the *Hazelwood* analysis to find that a school board's decision to terminate a teacher's employment based on her violation of school policy by using profanity in the classroom did not violate the First Amendment.⁸⁵ Applying *Hazelwood*, the court

76. *Virgil v. School Bd.*, 862 F.2d 1517, 1523 (11th Cir. 1989) ("[A]fter careful consideration, we cannot conclude that the school board's actions were not reasonably related to its legitimate concerns regarding the appropriateness . . . of the sexuality and vulgarity in these works.").

77. *Searcey v. Harris*, 888 F.2d 1314, 1319-20 (11th Cir. 1989) (considering the *Hazelwood* "context" when reviewing the "reasonableness of the two sets of regulations" limiting access to the school's Career Day).

78. 890 F.2d 794 (5th Cir. 1989).

79. *Id.* at 802.

80. *See id.* at 797-801. The Fifth Circuit's primary reliance on the *Connick* standard rather than the *Hazelwood* standard was presumably based on the fact that the teacher clearly failed to follow established policy regarding obtaining approval of his reading list, thus making the controversy merely an "ordinary employment dispute." *Id.* at 796, 802; *see infra* notes 102-105 and 123-132 (discussing the *Boring* court's reliance on the Fifth Circuit's opinion in *Kirkland*).

81. 944 F.2d 773 (10th Cir. 1991).

82. *Id.* at 778-79.

83. *Id.* at 777.

84. 147 F.3d 718 (8th Cir. 1998).

85. *Id.* at 724.

found that "[a] flat prohibition on profanity in the classroom is reasonably related to the legitimate pedagogical concern of promoting generally acceptable social standards."⁸⁶ The *Lacks* court made no reference to *Connick* in its decision.⁸⁷

3. *The Court's Reasoning.*—In *Boring v. Buncombe County Board of Education*, the United States Court of Appeals for the Fourth Circuit held that a teacher's selection and production of a school play was not protected speech under the First Amendment.⁸⁸ The en banc court was sharply divided, with only seven of the court's thirteen judges joining the majority opinion.⁸⁹ The court first determined that school plays are within the definition of school curriculum.⁹⁰ The court then applied the test established in *Connick* to find that the speech was not protected because it did not involve a matter of public concern.⁹¹ Finally, the court found that, even if the speech was protected, a legitimate pedagogical interest in the school curriculum justified restrictions on that speech.⁹²

The court began its analysis by determining that school plays, including the one at issue in this case, are part of the school curriculum.⁹³ The court found support for this determination in the Supreme Court's *Hazelwood* decision.⁹⁴ In *Hazelwood*, the Court stated that activities such as school plays can be considered part of the school curriculum if they are directed by a member of the faculty and are "designed to impart particular knowledge or skills to student participants and audiences."⁹⁵ Because the school play was supervised by Ms.

86. *Id.*

87. See *id.* at 723-24. In *Ward v. Hickey*, 996 F.2d 448, 452-54 (1st Cir. 1993), the United States Court of Appeals for the First Circuit applied *Hazelwood* to determine whether a teacher's First Amendment rights were violated when she was denied reappointment as a result of her classroom discussion of abortion of fetuses with Down's Syndrome. In its decision, the court, like the Eighth Circuit in *Lacks*, did not apply the *Connick* standard to its analysis of the teacher's First Amendment rights. *Id.*

88. *Boring*, 136 F.3d at 367.

89. *Id.* at 366. Judge Widener wrote the majority opinion, *id.* as well as the dissenting opinion in the vacated panel decision. Judge Motz wrote a dissenting opinion, *Boring*, 136 F.2d at 375 (Motz, J., dissenting), and the majority opinion in the vacated panel decision. *Boring v. Buncombe County Bd. of Educ.*, 98 F.3d 1474 (4th Cir. 1996), *vacated and reh'g granted en banc*, No. 95-2593 (4th Cir. Dec. 3, 1996), *reh'g en banc*, 136 F.3d 364 (4th Cir.), *cert. denied*, 119 S. Ct. 47 (1998).

90. *Boring*, 136 F.3d at 368.

91. *Id.*

92. *Id.* at 370.

93. *Id.* at 368.

94. *Id.*

95. *Id.* (quoting *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 271 (1988)).

Boring and was part of the theater program at the school, the court reasoned, the play *Independence* was part of the school curriculum.⁹⁶

Next, the court applied the standard adopted in *Connick* to conclude that Ms. Boring's choice of the play, and the subsequent editing of the play by the principal, did not present a matter of public concern and thus did not deserve First Amendment protection.⁹⁷ To support its application of *Connick* in the context of teacher curricular speech in the public schools, the court first relied on its decision in *Dimeglio v. Haines*.⁹⁸ In *Dimeglio*, the court held that a public employee's First Amendment rights were not violated when he was transferred for advising citizens on a zoning issue against his employer's instructions.⁹⁹ Applying *Connick*, the Fourth Circuit held that DiMeglio was "speaking as an employee, rather than as a citizen."¹⁰⁰ Furthermore, even if DiMeglio was speaking as a private citizen on a matter of public concern, his speech was still undeserving of protection because "the interests of the State in preventing disruption of the orderly management of its offices might well have outweighed DiMeglio's interests in expressing himself."¹⁰¹ The Fourth Circuit in *Boring* found even greater support for its application of the *Connick* standard in *Kirkland*, which the court found to be "indistinguishable" from *Boring*.¹⁰² In *Kirkland*, the Fifth Circuit found that the selection of an unapproved reading list by a public school teacher was not a matter of public concern and was therefore not entitled to First Amendment protection.¹⁰³ The Fifth Circuit held that the nonrenewal of the teacher's contract for his use of an unapproved reading list was "nothing more than an ordinary employment dispute."¹⁰⁴ The Fourth Circuit adopted the language of the *Kirkland* opinion in *Boring* and stated that Boring's claim was likewise "nothing more than an ordinary employment dis-

96. *Id.*

97. *Id.* The court characterized Ms. Boring's dispute with the school board as "nothing more than an ordinary employment dispute." *Id.*

98. 45 F.3d 790 (4th Cir. 1995).

99. *Id.* at 806. The court in *DiMeglio* reasoned that the government had the right to dictate daily operations under its roof "without fear of reprisal in the form of lawsuits from disgruntled subordinates who believe that they know better than their supervisors how to manage office affairs." *Id.*

100. *Id.* at 805.

101. *Id.*

102. *Boring*, 136 F.3d at 369. *But see id.* at 376-77 (Motz, J., dissenting) (finding *Kirkland* to be distinguishable and criticizing the majority's reliance on the case).

103. *Kirkland*, 890 F.2d at 800. In *Kirkland*, the teacher was informed by school officials that he could use his own reading list as long as he received approval from the school. *Id.* at 796. However, he never attempted to have his list approved. *Id.*

104. *Id.* at 802.

pute" and that her "speech" was therefore not entitled to First Amendment protection.¹⁰⁵

Finally, after determining that the speech was not protected, the court applied the "legitimate pedagogical interest" standard articulated in *Hazelwood*.¹⁰⁶ The court found that even if the speech was protected, the school had a "legitimate pedagogical interest" in punishing Ms. Boring for her speech.¹⁰⁷ The court stated that "[t]he makeup of the curriculum . . . is by definition a legitimate pedagogical concern."¹⁰⁸ Because the play was part of the curriculum, the school authorities had a legitimate pedagogical interest in controlling the production of the play.¹⁰⁹ The court concluded its opinion by reemphasizing that school authorities, not teachers, should control the makeup of the public school curriculum.¹¹⁰

In separate dissenting opinions, both Judge Hamilton and Judge Motz concluded that by failing to require the Board to provide "legitimate pedagogical concerns" for restricting Boring's speech the majority opinion did not follow the standard articulated in *Hazelwood*.¹¹¹ Judge Motz criticized the majority for automatically defining "any and every curriculum decision made by school administrators" as a legitimate pedagogical concern without requiring any evidence of the "legitimacy" of these concerns.¹¹² In addition, she rejected the majority's use of the standard set forth in *Connick* for analyzing teacher's in-class speech, reasoning that the proper standard in these cases should be that which was set forth in *Hazelwood*.¹¹³

105. *Boring*, 136 F.3d at 369. The *Boring* court also noted its agreement with the Fifth Circuit's conclusion that teachers do not have freedom to control the school curriculum. *See id.* ("'[P]ublic school teachers are not free, under the first amendment, to arrogate control of curricula.'" (quoting *Kirkland*, 890 F.2d at 802)). The Fifth Circuit relied on *Hazelwood* in coming to its conclusion. *Kirkland*, 890 F.2d at 800-01.

106. *Boring*, 136 F.3d at 370.

107. *Id.*

108. *Id.*

109. *Id.*

110. *Id.* at 370-71. The court noted that the "four essential freedoms" of a university should also apply to public schools. *Id.* at 370. These freedoms are "who may teach, what may be taught, how it shall be taught, and who may be admitted to study." *Id.* (citing *Sweezy v. New Hampshire*, 354 U.S. 234, 263-64 (1957) (Frankfurter, J., concurring)).

111. *See id.* at 376 (Motz, J., dissenting) (stating that while the Board may have legitimate pedagogical concerns, "nothing in the record . . . allows us to draw such a conclusion"); *id.* at 374 (Hamilton, J., dissenting) (stating that the case "presents one simple question: Can the Board censor Boring's speech without proffering any legitimate pedagogical concern justifying the restriction?").

112. *Id.* at 376 (Motz, J., dissenting).

113. *Id.* at 377. In a separate concurring opinion, Judge Luttig distinguished a teacher's in-class curricular speech, which did not warrant protection, from a teacher's in-class noncurricular speech, which he stated would "assuredly enjoy[] some First Amendment

4. *Analysis.*—In holding that a teacher’s right to select and produce a school play was not protected speech under the First Amendment,¹¹⁴ the Fourth Circuit in *Boring* failed to adopt a clear standard for analyzing teacher curricular speech in the public schools. The Fourth Circuit confused the issue of protected employee speech with the issue of academic freedom in the public schools.¹¹⁵ First, the court did not take advantage of the opportunity to eliminate the *Connick* analysis from cases involving curriculum matters and academic freedom.¹¹⁶ Second, the court should have embraced more fully the *Hazelwood* analysis for determining the level of First Amendment protection afforded to a teacher’s school-sponsored speech, as this analysis more appropriately addresses restrictions on curricular activities such as school productions.¹¹⁷ Third, because the court failed to specifically define the limits of the *Hazelwood* “legitimate pedagogical concern” standard or to conduct any inquiry into the Board’s basis for its decision, its approach is likely to be used by later courts to place further limitations on the ability of teachers to make curricular decisions.

a. *The Connick Standard and its Application to Curricular Speech.*—The court’s application of the standard articulated in *Connick* is misplaced for two reasons. First, the “speech” at issue in *Pickering* and *Connick* involved statements by employees that were critical of the workplace.¹¹⁸ In contrast, the speech at issue in *Boring* did not involve any criticism of the workplace or the school’s authority. Rather, it involved a teacher’s right to select a portion of the school curriculum.¹¹⁹ The *Boring* court applied the *Connick* standard because both

protection.” *Id.* at 373 (Luttig, J., concurring). He noted that the latter category was not at issue in this case. *Id.*

114. *Boring*, 136 F.3d at 367.

115. See generally MCCARTHY ET AL., *supra* note 50, at 285 (defining academic freedom as the principle that “faculty members should be free from governmental controls in conducting research and imparting knowledge to students” and discussing the notion that courts have not been willing to extend the rights associated with academic freedom in the university setting to the public elementary and secondary schools). See also *infra* note 180 and accompanying text (discussing the reason why academic freedom is afforded heightened protection in the university setting).

116. See *supra* notes 44-51 and accompanying text (describing the public concern analysis articulated in *Connick*).

117. See *supra* notes 66-74 and accompanying text (describing the standard applied to student school-sponsored speech in *Hazelwood*).

118. See *Connick v. Myers*, 461 U.S. 138, 140-41 (1983) (involving an assistant district attorney who was dissatisfied with her proposed transfer and circulated a questionnaire on office morale and policy); *Pickering v. Board of Educ.*, 391 U.S. 563, 564 (1968) (involving the First Amendment rights of a teacher who sent a letter to a local newspaper criticizing school funding proposals).

119. *Boring*, 136 F.3d at 367.

cases involved speech by a public employee that resulted in an adverse employment decision made based on that "speech."¹²⁰ However, the speech at issue in *Boring* should not be treated similarly to the speech involved in *Connick*. When Boring selected the school play, she was speaking as an employee on a matter of interest to the school through the selection of curriculum, a form of speech not covered in the *Connick* balancing test. In her dissenting opinion, Judge Motz argued that "[Boring's] speech is neither ordinary workplace speech nor common public debate" and therefore cannot be subject to the categorical determination used in *Connick*.¹²¹ Because teacher curricular speech has a special purpose, namely to educate, the *Connick* standard seems to be inapplicable to the public schools.¹²²

The *Boring* court relied heavily on the Fifth Circuit's decision in *Kirkland*, which also applied the *Connick* standard to a teacher's curricular speech.¹²³ In *Kirkland*, a teacher alleged that his First Amendment rights were violated when his employment contract was not renewed as a result of his use of an unapproved reading list.¹²⁴ There are two main concerns with the court's reliance on this case. First, because of the curricular nature of the speech at issue in *Kirkland*, a teacher's unapproved reading list, like the approval of the play in *Boring*, does not fit squarely into the categories articulated in *Connick*.¹²⁵ Second, although both cases address teacher curricular speech, the cases are factually distinguishable.

In *Kirkland* the teacher was aware of the school's guidelines for obtaining approval for substitute reading lists, but he chose to ignore them.¹²⁶ Furthermore, he asserted that his control over the curriculum was "unlimited."¹²⁷ The *Kirkland* court found that because Kirkland never gave school officials the chance to approve his list, his

120. *See id.* at 368.

121. *Id.* at 378 (Motz, J., dissenting).

122. *Id.* (arguing that placing curricular speech into these categories "ignores the essence of teaching—to educate, to enlighten, to inspire—and the importance of free speech to this most critical endeavor").

123. *Boring*, 136 F.3d at 369.

124. *Kirkland*, 890 F.2d at 795.

125. *See supra* note 122 and accompanying text (discussing the inapplicability of the *Connick* standard to teacher curricular speech); *see also infra* notes 133-134 and accompanying text (discussing the unique aspects of the public school environment).

126. *Kirkland*, 890 F.2d at 796.

127. *Id.* at 801. The Fifth Circuit rejected this argument, relying on the Supreme Court's recognition in *Hazelwood* of the rights of school officials to place restrictions on school-sponsored speech. *Id.* (citing *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 267 (1988)).

speech did not rise to the level of public concern.¹²⁸ It was “an ordinary employment dispute” because the issue of censorship was not raised until the decision was made not to rehire him.¹²⁹ Thus, even though Kirkland’s speech was curricular in nature and should normally not be subject to the *Connick* analysis, the speech came closer than Boring’s to being a direct violation of workplace policy, the type of speech generally governed by *Connick*. In contrast, Boring followed school guidelines by informing the principal about her choice of the play *Independence*, and the issue of censorship of the school play was discussed prior to the transfer decision.¹³⁰ In addition, Boring did not dispute the school’s authority over the curriculum. Rather, she disputed the Board’s inability to show that their actions were “reasonably related to legitimate pedagogical concerns.”¹³¹ Although it remains questionable whether the *Connick* standard should be applied to any type of curricular speech, it is clearly misplaced in *Boring*. Boring followed school rules and was not asserting unlimited authority over the curriculum; her dismissal for the selection and production of the school play was far more than an “ordinary employment dispute,”¹³² and the holding in *Kirkland*, and its reliance on *Connick*, should not apply.

Second, by applying the standard in *Connick*, the court failed to acknowledge the “special characteristics of the school environment” which make it different from an ordinary public workplace and thus not susceptible to the analysis required by *Connick*.¹³³ The school’s interest involves providing the best possible education for students. School officials “should not be required to demonstrate that a restriction on in-class speech is necessitated by workplace efficiency or harmony.”¹³⁴ In *Miles v. Denver Public Schools*,¹³⁵ the United States Court of Appeals for the Tenth Circuit held that a teacher’s in-class speech

128. See *id.* at 800 (stating that “while an employee need not publicly announce a matter of general concern in protest, and may use private channels instead, he cannot remain mute and thereafter self-servingly label his conduct to be a matter of public concern” (footnote omitted)).

129. *Id.* at 800, 802.

130. *Boring*, 136 F.3d at 366. There is some dispute, however, over whether Boring may have violated the school’s “controversial materials policy.” *Id.* at 367.

131. *Id.* at 377 (Motz, J., dissenting) (quoting *Hazelwood*, 484 U.S. at 273) (internal quotation marks omitted).

132. *Boring*, 136 F.3d at 368.

133. See *Tinker v. Des Moines Indep. Community Sch. Dist.*, 393 U.S. 503, 506 (1969); see also *supra* Part 2.b (discussing the Supreme Court’s decision in *Tinker*).

134. *Boring*, 136 F.3d at 378 (Motz, J., dissenting); see also *supra* note 70 (discussing the reasons articulated in *Hazelwood* for giving school officials heightened control over the school curriculum).

135. 944 F.2d 773 (10th Cir. 1991).

was not protected.¹³⁶ The court rejected the *Pickering* and *Connick* analysis in favor of the analysis of school-sponsored speech adopted by the Supreme Court in *Hazelwood*, recognizing that there are special responsibilities that the state maintains in providing education to its citizens that are not applicable in other public settings.¹³⁷ In choosing to apply the *Hazelwood* standard, the *Miles* court found that a teacher's expression during a ninth-grade government class, like the students' expression in a school newspaper at issue in *Hazelwood*, was school-sponsored speech.¹³⁸ In rejecting the applicability of *Pickering* and *Connick* to the teacher's in-class expression, the court reasoned that "[b]ecause of the special characteristics of a classroom environment, in applying *Hazelwood* instead of *Pickering* we distinguish between teachers' classroom expression and teachers' expression in other situations that would not reasonably be perceived as school-sponsored."¹³⁹ Furthermore, the *Miles* court reasoned that the test articulated in *Pickering* and *Connick* relates to the "state's interests as an employer" but not the "interests of the state as educator."¹⁴⁰ Thus, the balancing test adopted in *Pickering*, which emphasized workplace efficiency, should be replaced by a balancing standard that more fairly reflects the interests of the public schools, namely the "legitimate pedagogical concern" standard. The Fourth Circuit should have followed the precedent set by the Tenth Circuit in *Miles* by eliminating the *Connick* standard from the analysis of a teacher's in-class curricular speech.

b. *Applying Hazelwood to Teacher Curricular Speech.*—The Fourth Circuit properly followed the Supreme Court's decision in *Ha-*

136. *Id.* at 777, 779 (holding that the school acted reasonably in disciplining a teacher who made comments during class about rumors that two students had engaged in sexual intercourse on the school tennis court during lunch hour).

137. *Id.* at 777.

138. *Id.* at 776.

139. *Id.* at 777. In applying *Hazelwood* to the facts of the case, the *Miles* court first found that the school's interests in "preventing Miles from using his position of authority to confirm an unsubstantiated rumor[,] ensuring that teacher employees exhibit professionalism and sound judgment[, and] providing an educational atmosphere where teachers do not make statements about students that embarrass those students among their peers" were legitimate pedagogical interests. *Id.* at 778. Second, the court found that the actions taken by the school—namely placing Miles on paid administrative leave while the school was investigating the incident and issuing a letter of reprimand which stated the school's interest in punishing him—were reasonably related to the interests articulated by the school. *Id.* at 778-79. Finally, the court found that Miles's speech was not protected by "a constitutional right to academic freedom." *Id.* at 779. As a result of these findings, the court found that Miles's speech was not constitutionally protected. *Id.*

140. *Id.*

zelwood in holding that the play was part of the school curriculum, and in so doing, recognized the curricular nature of Ms. Boring's speech.¹⁴¹ However, by turning its attention to whether the selection and production of the school play was a matter of public concern, the court abandoned its focus on the fact that this case involved decisions about school curriculum and failed to fully embrace the *Hazelwood* analysis.¹⁴² Only after the court determined that the speech was not protected based on the *Connick* standard did it return to the *Hazelwood* analysis and attempt to define the "legitimate pedagogical concerns" that justified the school's restrictions. By doing so, the court missed the opportunity to fully adopt *Hazelwood*, and not *Connick*, as the proper framework to be used when analyzing teacher curricular speech in the public schools.

The Supreme Court's decision in *Hazelwood* most clearly demonstrates the appropriate standard for analyzing restrictions on a teacher's control over school-sponsored, curricular activities such as the school play at issue in *Boring*. First, in *Hazelwood*, the Court clearly included "theatrical productions" in its list of school-sponsored activities over which school boards may exercise their authority.¹⁴³ By articulating an expansive definition of "curriculum" and "school-sponsored," the Supreme Court created a general standard that courts can and should use when reviewing curricular decisions made by school authorities.¹⁴⁴

Second, although *Hazelwood* involved restrictions on student expression through a school newspaper, the Court noted that "school officials may impose reasonable restrictions on the speech of students, teachers, and other members of the school community."¹⁴⁵ The Supreme Court has not directly held that the *Hazelwood* standard applies to teachers, but courts have nonetheless applied it to many forms of teacher curricular expression, including classroom interaction and

141. See *Boring*, 136 F.3d at 368 ("It is plain that the play was curricular from the fact that it was supervised by a faculty member, Mrs. Boring; . . . and the theater program at the high school was obviously intended to impart particular skills . . . to student participants.").

142. See *id.* (stating that "[p]laintiff's selection of the play . . . does not present a matter of public concern and is nothing more than an ordinary employment dispute").

143. See *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 271 (1988) (stating that "[e]ducators are entitled to exercise greater control" over expression such as "school-sponsored publications, theatrical productions, and other expressive activities").

144. See *Boring*, 136 F.3d at 368 (applying the *Hazelwood* definition of curriculum); see also *Cox*, *supra* note 59, at 1041 (stating that courts are applying the *Hazelwood* standard to the review of "all curriculum-related decisions by local school boards").

145. *Hazelwood*, 484 U.S. at 267.

selection of school materials.¹⁴⁶ Thus, the standard has been broadly applied both to curriculum choices and teacher speech through classroom interaction with students. The *Boring* court should have followed the other federal circuits that have rejected *Connick* as the appropriate standard for addressing teacher curricular speech and applied only the *Hazelwood* analysis, as the *Hazelwood* analysis more appropriately addresses restrictions on teacher speech within the school curriculum.¹⁴⁷

c. Failure to Define Limits of the "Legitimate Pedagogical Concern" Standard Indicates Strong Stand for School Board Discretion.—The Fourth Circuit, after determining that *Boring's* speech was not protected, nonetheless applied the *Hazelwood* "legitimate pedagogical concern" standard to the facts of this case because the court recognized that the selection and production of the school play was part of the school curriculum.¹⁴⁸ However, because the court failed to specifically define the limits of the standard in its decision, the court's application of the standard to school-sponsored activities is likely to be used by future courts to place further limitations on the ability of teachers to make curricular decisions.¹⁴⁹

Once the court established that the selection and production of the school play was a part of the school curriculum, but was not a matter of public concern, it returned to the *Hazelwood* analysis and attempted to define the "legitimate pedagogical concerns" that justi-

146. See *Ward v. Hickey*, 996 F.2d 448, 452-54 (1st Cir. 1993) (applying *Hazelwood* to a teacher's classroom speech regarding abortion of fetuses with Down's Syndrome); *Miles v. Denver Pub. Sch.*, 944 F.2d 773, 777 (10th Cir. 1991) (applying *Hazelwood* to a teacher's in-class comments about rumors that two students had engaged in sexual intercourse on the school tennis court during lunch hour); *Roberts v. Madigan*, 921 F.2d 1047, 1056-57 (10th Cir. 1990) (applying *Hazelwood* to a decision by school administrators to prohibit a teacher from reading from the Bible during class and from keeping religious books in his classroom library); *Virgil v. School Bd.*, 862 F.2d 1517, 1521-23 (11th Cir. 1989) (applying the *Hazelwood* standard to a school board's decision to ban a humanities textbook).

147. The *Boring* court noted that this case involved employee speech and not student speech as in *Hazelwood*. *Boring*, 136 F.3d at 371 n.2. Thus, the majority apparently did not find the *Hazelwood* analysis directly applicable to teacher speech. But see *id.* at 378 (Motz, J., dissenting) (finding that the "*Hazelwood* analysis should apply to a teacher's in-class speech, as well as a student's in-class speech").

148. See *Boring*, 136 F.3d at 368-70.

149. See E. Edmund Reutter, Jr., Commentary, *Academic Freedom Advisory: Be Wary of the Long Arm of Kuhlmeier*, 89 EDUC. L. REP. 347, 354 (1994) (stating that by expanding the definition of such terms as "school-sponsored speech" and "legitimate pedagogical concerns," courts may "intrude upon the professional judgment of teachers"); see also *infra* notes 178-179 and accompanying text (describing a subsequent decision that relied on *Boring* to place absolute limitations on the ability of public university professors to make curricular decisions).

fied the school's restrictions.¹⁵⁰ Rather than inquiring into the reasons why the Board's restrictions may have been justified, the court concluded that "[t]he makeup of the [school] curriculum . . . is by definition a legitimate pedagogical concern."¹⁵¹ Thus, the court justified the restrictions by relying solely on the fact that the school play was part of the school curriculum and did not inquire into the Board's reasons for its restrictions.

In *Boring*, the court broadened the definition of "legitimate pedagogical concerns" and retreated from requiring school officials to articulate the types of concerns that would justify restrictions under the *Hazelwood* standard, such as the speech's suitability for immature audiences and the protection of students' privacy interests.¹⁵² Other courts that have applied the *Hazelwood* standard have required school officials to articulate such concerns.¹⁵³ Both the United States Court of Appeals for the Tenth Circuit and the United States Court of Appeals for the Eleventh Circuit have conducted a two-step inquiry when evaluating teacher speech under the *Hazelwood* standard.¹⁵⁴ The circuits first determined whether the school had legitimate pedagogical concerns, and second, whether the school's actions were reasonably related to these concerns.¹⁵⁵ In *Miles*, the school's interests included "preventing Miles from using his position of authority to confirm an unsubstantiated rumor[,] ensuring that teacher employees exhibit professionalism and sound judgment[, and] providing an educational atmosphere where teachers do not make statements about students that embarrass those students among their peers."¹⁵⁶ After determining that these were "legitimate pedagogical interests," the *Miles* court found that the school's action of placing Miles on paid administrative leave "allowed the school . . . to disassociate itself from the speech," thus conforming with the first interest articulated by the court

150. *Boring*, 136 F.3d at 370; *see id.* at 376 (Motz, J., dissenting) (describing the majority's failure to define "legitimate pedagogical concerns"). *But see id.* at 371 (Wilkinson, J., concurring) (criticizing the dissenters' attempts to define "legitimate pedagogical concern," calling it a "loose, slippery, litigious phrase" that the courts can not be expected to define).

151. *Boring*, 136 F.3d at 370.

152. *See Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 271-72, 276 (stating reasons for justifying a school's restrictions on school-sponsored speech); *see also supra* text accompanying notes 73-74 (noting the legitimate pedagogical concerns that warrant reasonable restrictions on school-sponsored speech).

153. *See Boring*, 136 F.3d at 376 (Motz, J., dissenting) (noting that since *Hazelwood* was decided, courts have required school officials to at least offer some basis for showing that their actions related to legitimate pedagogical concerns).

154. *See Miles v. Denver Pub. Sch.*, 944 F.2d 773, 778-79 (10th Cir. 1991); *Virgil v. School Bd.*, 862 F.2d 1517, 1522-25 (11th Cir. 1989).

155. *See Miles*, 944 F.2d at 778-79; *Virgil*, 862 F.2d at 1522-25.

156. *Miles*, 944 F.2d at 778.

above.¹⁵⁷ Further, the court found that the letter of reprimand which specifically requested that the teacher refrain from making comments about students in class was reasonably related to the school's third interest in protecting students against negative publicity.¹⁵⁸ In *Virgil v. School Board*,¹⁵⁹ the school board stipulated its motivations for removing readings from a curriculum.¹⁶⁰ The motivations for removing the readings included beliefs that the readings were "excessively vulgar[,] . . . immoral[,] . . . violative of the socially and philosophically conservative mores . . . of the Columbia County populace[,] . . . offensive to a substantial portion of the Columbia County populace[,] . . . [and] inappropriate to the age, maturity, and development of the students."¹⁶¹ The court determined that these were legitimate pedagogical concerns, and further, concluded that because of the youth of the students, the excessively vulgar and sexually explicit nature of the readings, and the fact that the materials had not been banned from the school but had merely been removed from the curriculum of a particular class, the school's actions were reasonable.¹⁶²

In *Ward v. Hickey*,¹⁶³ the United States Court of Appeals for the First Circuit took a slightly different approach to its application of the *Hazelwood* standard. The court adopted a set of factors, based on prior precedent, to be considered when deciding whether a prohibition on speech is "reasonably related to legitimate pedagogical concerns."¹⁶⁴ These include "the age and the sophistication of students, the relationship between teaching method and valid educational objective, and the context and manner of the presentation."¹⁶⁵ In addition, in *Searcey v. Harris*,¹⁶⁶ the United States Court of Appeals for the Eleventh Circuit, in striking down part of a regulation that placed restrictions on participation in a school's Career Day, stated that it could not "infer the reasonableness of a regulation from a vacant record."¹⁶⁷

157. *Id.*

158. *Id.*

159. 862 F.2d 1517 (11th Cir. 1989).

160. *Id.* at 1522-23.

161. *Id.* at 1523 n.7.

162. *Id.* at 1523-25.

163. 996 F.2d 448 (1st Cir. 1993).

164. *Id.* at 453.

165. *Id.* (citing *Mailloux v. Kiley*, 448 F.2d 1242, 1243 (1st Cir. 1971) (per curiam)); see also *Lacks v. Ferguson Reorganized Sch. Dist.* 147 F.3d 718, 724 (8th Cir. 1998) (finding that "[a] flat prohibition on profanity in the classroom is reasonably related to the legitimate pedagogical concern of promoting generally acceptable social standards").

166. 888 F.2d 1314 (11th Cir. 1989).

167. *Id.* at 1322. The court found it problematic that the school board offered no evidence to explain a requirement in the regulation requiring organizations to describe their "present affiliation." *Id.* The majority in *Boring* quoted this case when arguing that the

The court in *Boring* failed to adopt a method or set of factors such as those set forth above for evaluating restrictions on school-sponsored speech using the *Hazelwood* standard. In fact, the majority went even further by not requiring the officials to assert any justification for their restrictions. The school officials may have had legitimate concerns, and if they had been articulated, it is likely that the Board could have easily won this case at the district court level without providing any grounds for appeal.¹⁶⁸ By failing to inquire into the reasons for the board's restrictions, however, the court gave the Board unlimited discretion in restricting teacher curricular speech and provided little guidance for future courts on how to apply the *Hazelwood* standard.

Although the Court in *Hazelwood* upheld the rights of school officials to control the curriculum in the public schools, the Court did provide for a "limited intrusion" into the rationale behind a school board's decision.¹⁶⁹ The Fourth Circuit's decision in *Boring* failed to follow *Hazelwood* by failing to inquire into the rationale behind the school's restrictions on the curriculum.¹⁷⁰ By failing to do so, the court failed to provide teachers with any guidance as to the types of concerns that might justify school restrictions on teacher speech. Furthermore, the court provided little reason for school boards to provide more notice as to what activities they plan to restrict.¹⁷¹ Providing teachers with notice of school board concerns would pre-

"purpose of a curricular program is by definition 'pedagogical.'" *Boring*, 136 F.3d at 370 (internal quotation marks omitted) (quoting *Searcey*, 888 F.2d at 1319). However, in her dissent, Judge Motz criticized the majority's use of this statement to justify its failure to inquire into the school board's restrictions given that the court in *Searcey* found this type of failed inquiry to "overstate[] the deference a court must pay to School Board decisions." *Id.* at 377 (Motz, J., dissenting) (alteration in original) (quoting *Searcey*, 888 F.2d at 1321).

168. *See id.* at 374 (Hamilton, J., dissenting) (stating that if the Board had offered some proof as to the reasons behind its restrictions that "[i]n all likelihood, if remanded, the case would be resolved in favor of the Board at the summary judgment stage, as several pedagogical concerns probably justified the Board's action").

169. *Id.* at 374-75 (stating that the standard articulated by *Hazelwood*, requiring school officials to provide reasons for their restrictions, is "one to which we are bound to adhere until the Supreme Court states otherwise"). The *Hazelwood* Court stated that it is only when the school board's decision to place restrictions on school-sponsored speech "has no valid educational purpose that the First Amendment is so 'directly and sharply implicate[d],' as to require judicial intervention to protect students' constitutional rights." *Hazelwood*, 484 U.S. at 273 (alteration in original) (quoting *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968)).

170. *See Boring*, 136 F.3d at 369-70.

171. The courts are not the sole vehicle for determining the extent of the school's authority over the curriculum. *See MCCARTHY ET AL.*, *supra* note 50, at 285 (noting that state legislatures grant authority over the curriculum to local school boards by statute).

vent teachers from becoming too "cautious and reserved" in the classroom because they are not aware of the school's policy.¹⁷²

The Fourth Circuit recognized the importance of notice in a 1979 decision in which it found that a teacher's First Amendment rights had not been violated when she was demoted for reading to her class part of a note that she found.¹⁷³ The court held that a state statute provided adequate notice to her of the grounds for dismissal of a public school teacher.¹⁷⁴ More recently, the Court of Appeals for the First Circuit held that before a school board can discipline a teacher's classroom expression, the teacher should be put on notice as to the forms of expression that are prohibited.¹⁷⁵ Although notice in these examples was provided statutorily or through school board policies, it nonetheless highlights the important role that the courts play in determining the extent of school authority over curricular decisions. By not requiring the school board to articulate the types of concerns that would justify its restrictions, the court missed the opportunity to provide teachers with notice of the types of activities that are likely to be restricted in the future.¹⁷⁶

The court's failure to adequately define the "legitimate pedagogical concern" standard and its decision not to require school boards to give reasons for placing restrictions on the school curriculum has the effect of significantly expanding school board discretion. Furthermore, the court's strong statement that "the school, not the teacher, has the right to fix the school curriculum" is likely to be used by courts to place even more discretion in the hands of school boards at the expense of a teacher's academic freedom.¹⁷⁷ A recent Third Circuit decision gives an indication of how far courts may extend the Fourth Circuit's holding in *Boring*. In *Edwards v. California University*,¹⁷⁸ the court cited language from *Boring* in holding that a "public

172. Turner-Egner, *supra* note 57, at 372-73 (arguing that this type of reservation on the part of teachers would itself limit academic freedom in the classroom (quoting Parducci v. Rutland, 316 F. Supp. 352, 357 (M.D. Ala. 1970))).

173. Frison v. Franklin County Bd. of Educ., 596 F.2d 1192, 1193 (4th Cir. 1979).

174. *Id.* at 1194.

175. See Ward v. Hickey, 996 F.2d 448, 453 (1st Cir. 1993) ("Indeed, this circuit has long recognized a teacher's right to notice of what classroom conduct is prohibited."); see also Lacks v. Ferguson Reorganized Sch. Dist., 147 F.3d 718, 723 (8th Cir. 1998) (holding that a teacher who allowed her students to use profanity in writing short plays had been given sufficient notice that this conduct was restricted by the Student Discipline Code which "clearly prohibits profanity").

176. It is possible that the "controversial materials policy" mentioned briefly by the court in *Boring* could have provided sufficient notice to Ms. Boring, although this is not discussed in the opinion. *Boring*, 136 F.3d at 367.

177. *Id.* at 370.

178. 156 F.3d 488 (3d Cir. 1998).

university professor does not have a First Amendment right to decide what will be taught in the classroom.”¹⁷⁹ The *Edwards* decision failed to acknowledge that university professors have generally been entitled to broader academic freedom than teachers at the elementary or secondary school level.¹⁸⁰ Additionally, the court’s decision runs contrary to past decisions that have recognized that university professors should be afforded at least some degree of academic freedom.¹⁸¹

Teachers and teachers’ associations are concerned about the implications of the Fourth Circuit’s holding in *Boring*. In a recent editorial, the general counsel for the National Education Association (NEA) cited the *Boring* decision as an example of how the courts have placed severe limitations on a teacher’s First Amendment rights in the classroom and have “sen[t] teachers a frightening message: [t]hose who stray beyond the narrow confines of the approved curriculum by using controversial teaching methods or materials do so at their own risk.”¹⁸²

5. *Conclusion.*—In *Boring*, the Fourth Circuit held that a teacher’s selection and production of a school play was not protected

179. *Id.* at 491. In noting that Edwards had a right to advocate the use of curriculum materials outside of the classroom, but not inside the classroom, the *Edwards* court relied on the language at the end of the *Boring* opinion which stated that “‘the school, not the teacher, has the right to fix the curriculum.’” *Id.* (quoting *Boring*, 136 F.3d at 370).

180. See Mark G. Yudof, *Three Faces of Academic Freedom*, 32 *LOV. L. REV.* 831, 836 (1987) (distinguishing the concept of broad academic freedom in the university setting which affords “significant latitude” to professors to research and publish, from the more limited concept of academic freedom in the elementary and secondary school setting, where teachers are “rarely engaged in advanced research, . . . or in testing and sharing their hard-won insights with their students”); *supra* note 115 (defining academic freedom).

181. See *University of Pa. v. Equal Employment Opportunity Comm’n*, 493 U.S. 182, 199 (1990) (“Nothing we say today should be understood as a retreat from this principle of respect for legitimate academic decisionmaking.”); *Regents of the Univ. of Mich. v. Ewing*, 474 U.S. 214, 225 (1985) (“When judges are asked to review the substance of a genuinely academic decision, . . . they should show great respect for the faculty’s professional judgment.”); *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 312 (1978) (“Academic freedom, though not a specifically enumerated constitutional right, long has been viewed as a special concern of the First Amendment.”); *Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967) (“Our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned.”); *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957) (“The essentiality of freedom in the community of American universities is almost self-evident. . . . To impose any strait jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation.”). But see *Ewing*, 474 U.S. at 226 n.12 (stating that academic freedom also includes “autonomous decisionmaking by the academy itself”).

182. Michael D. Simpson, *Academic Freedom Takes a Hit*, NEA TODAY, Nov. 1998, at 27. Simpson asserts: “Courts have sent the message: It’s okay to fire teachers who use controversial materials.” *Id.* He cites *Boring* and *Lacks* in support of his assertion. *Id.*; see *supra* notes 165, 175 and accompanying text (discussing *Lacks*).

speech under the First Amendment.¹⁸³ The court followed a number of Supreme Court decisions that have recognized the broad authority that school officials maintain over the curriculum. However, by confusing the issue of employee speech in the workplace with the issue of academic freedom, the court declined to announce a clear standard for use by later courts in analyzing restrictions on a teacher's speech within the context of the school curriculum. Furthermore, by limiting its inquiry into the justifications behind restrictions on the school curriculum, the *Boring* court has paved the way for school boards to exercise unlimited authority over the curriculum while substantially limiting the freedom of teachers in the classroom.

JOANNA B. GOGER

B. Erosion on the Slippery Slope of First Amendment Protection for Books

In *Rice v. Paladin Enterprises, Inc.*,¹⁸⁴ the United States Court of Appeals for the Fourth Circuit considered whether the First Amendment¹⁸⁵ provides an absolute defense to a wrongful death action brought against the publisher of an instructional manual for professional killers that was used by a "hit man" in preparing to carry out a contract murder, when the publisher intended and knew that the manual would be used to commit murders, and the manual assisted the hit man in killing the decedents.¹⁸⁶ The Fourth Circuit answered in the negative, holding that the estates and relatives of the victims could maintain a civil cause of action against the publisher for aiding and abetting the murders, and that this cause of action was not barred by the constitutional guarantees of free speech and freedom of the press.¹⁸⁷ The court reasoned that the book's highly detailed instructions on how to be a professional killer, coupled with its persuasive tone and glorification of the profession, permitted a finding that the book was intended and likely to incite or produce imminent lawless activity.¹⁸⁸ Although the court only explicitly exempts from First

183. *Boring*, 136 F.3d at 367.

184. 128 F.3d 233 (4th Cir. 1997), *cert. denied*, 118 S. Ct. 1515 (1998).

185. The First Amendment of the Constitution of the United States provides, in pertinent part, that "Congress shall make no law . . . abridging the freedom of speech, or of the press" U.S. CONST. amend. I.

186. *Rice*, 128 F.3d at 241.

187. *Id.* at 265.

188. *See id.* at 253-55 (stating four bases upon which a reasonable jury could find that the publisher possessed the requisite intent to support civil liability, including "the book's extensive, decided, and pointed promotion of murder" and the fact that "the declared purpose of *Hit Man* itself is to facilitate murder").

Amendment protection detailed instructional manuals that teach and encourage activity that is criminal per se,¹⁸⁹ its holding could be applied in such a way as to endanger other forms of expression.

1. *The Case.*—In 1983, Paladin Enterprises, Inc., published *Hit Man: A Technical Manual for Independent Contractors*¹⁹⁰ (*Hit Man*) and *How to Make a Disposable Silencer, Vol. II. (Silencers)*.¹⁹¹ *Hit Man* is a 130-page manual that contains “detailed factual instructions on how to murder and to become a professional killer.”¹⁹² It is remarkable for two reasons. First, the book contains meticulous instructions, some accompanied by photographs, on how to be a contract killer.¹⁹³ It includes instructions on how to solicit clients; schedule and collect fees; choose the proper weapons and other materials a contract killer will need; construct a disposable silencer; and conceal every aspect of the crime.¹⁹⁴ It contains explicit instructions on how to kill a person using a knife, ice pick, gun, or bomb; how to dispose of the corpse; and how to torture a person when torture is part of the contract.¹⁹⁵

Second, *Hit Man*, “through powerful prose in the second person and imperative voice, . . . encourages its readers in their specific acts of murder” by reassuring them that they will not fail or be caught, and by glamorizing the “profession” as a way to prove one’s masculinity and superiority over others.¹⁹⁶

189. *Id.* at 263 (“The Supreme Court has never protected as abstract advocacy speech so explicit in its palpable entreaties to violent crime.”).

190. REX FERAL, HIT MAN: A TECHNICAL MANUAL FOR INDEPENDENT CONTRACTORS (1983) [hereinafter HIT MAN]. “Rex Feral” is almost certainly a pseudonym. “Rex,” in Latin, means “king.” See WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE 1945 (1993). “Feral” is an adjective that means, *inter alia*, “causing death,” “deadly,” “fatal,” or “of or relating to the dead.” *Id.* at 838.

191. *Rice v. Paladin Enters., Inc.*, 940 F. Supp. 836, 838 (D. Md. 1996) (mem.), *rev’d*, 128 F.3d 233 (4th Cir. 1997), *cert. denied*, 118 S. Ct. 1515 (1998). The parties stipulated that approximately 13,000 copies of each book had been sold nationally since 1983. *Id.*

192. *Rice*, 128 F.3d at 239. The first several pages of the Fourth Circuit’s opinion are comprised wholly of excerpts from *Hit Man*. See *id.* at 235-39 (quoting portions of *Hit Man*). The court attempted to set forth passages that were representative, in substance and presentation, of the entire manual. *Id.* at 239 n.1. The court “even felt it necessary to omit portions of the [] few illustrative passages in order to minimize the danger to the public from their repetition.” *Id.*

193. See *id.* at 238-41 (discussing several instructions contained in the book, as well as how those instructions were followed by the killer of the decedents in the present case); see also HIT MAN, *supra* note 190, at 42-45, 48-50 (exemplifying how some of the instructions in the book are illustrated with photographs).

194. See HIT MAN, *supra* note 190, at vii-viii for a complete list of the contents of the book.

195. See *Rice*, 128 F.3d at 236-38 (quoting particular portions of *Hit Man*).

196. *Id.* at 252. *Hit Man*’s encouragement and glamorization of contract killing is illustrated by the following passages that describe events after the killing:

In the early morning hours of March 3, 1993, James Perry murdered Mildred Horn, her eight-year-old quadriplegic son, Trevor, and Trevor's nurse, Janice Saunders.¹⁹⁷ Perry committed the murders pursuant to a contract with Lawrence Horn, Mildred's former husband and Trevor's father, who stood to collect \$2 million from a trust for the benefit of his son, which was payable to Lawrence upon the deaths of Trevor and Mildred.¹⁹⁸ Perry was convicted of the murders and received three death sentences and a life sentence for conspiracy to commit murder.¹⁹⁹ Lawrence Horn was convicted and sentenced to life without the possibility of parole for hiring Perry to commit the murders.²⁰⁰

Perry ordered and received both *Hit Man* and *Silencers* in January 1992.²⁰¹ Perry meticulously followed a number of instructions contained in the manuals in planning, executing, and trying to get away with the murders.²⁰² Relatives and representatives of the victims filed

After you have arrived home the events that took place take on a dreamlike quality. You don't dwell on them. You don't worry. You don't have nightmares. You don't fear ghosts. . . .

By the time you collect the balance of your contract fee, the doubts and fears of discovery have faded. Those feelings have been replaced by cockiness, a feeling of superiority, a new independence and self-assurance.

[E]verything seems to have changed.

The people around you have suddenly become so *aggravatingly ordinary*. You start to view them as an irritating herd of pathetic sheep, doing as they are told

You too have become different. You recognize that you made some mistakes, but you know what they were, and they will never plague you again. Next time (and you know there will be a next time), there will be no hesitation, no fear.

Your experience in facing death head-on has taught you about life. You have the power and ability to stand alone. *You no longer need a reason to kill.*

The things you have learned about life are important. You may wish to pass on your observations to someone you care about. . . . Or you may want to overawe some new woman in your life with your masculinity and you feel the urge to shock her just a little by hinting at your true profession.

Start now in learning to control your ego. That means, above all, *keeping your mouth shut!* You are a man. Without a doubt, you have proved it.

Id. at 238-39 (alteration in original) (quoting *HIT MAN*, *supra* note 190, at 108, 111-13).

197. *Id.* at 239; *Perry v. State*, 344 Md. 204, 208-09, 686 A.2d 274, 276 (1996).

198. *Rice*, 128 F.3d at 239.

199. *Perry*, 344 Md. at 208, 686 A.2d at 276.

200. *Rice v. Paladin Enters., Inc.*, 940 F. Supp. 836, 838 n.1 (D. Md. 1996) (mem.), *rev'd*, 128 F.3d 233 (4th Cir. 1997), *cert. denied*, 118 S. Ct. 1515 (1998).

201. *Rice*, 128 F.3d at 242 n.2.

202. *Id.* at 239; *Rice*, 940 F. Supp. at 839. For example, *Hit Man* recommends that a contract killer use an AR-7 rifle and kill his victims by shooting them through the eyes from a distance of three to six feet. *Rice*, 128 F.3d at 240 (citing *HIT MAN*, *supra* note 190, at 21, 24). Perry used an AR-7 rifle to shoot Mildred Horn and Janice Saunders through the eyes from a distance of three feet. *Id.* (citing *Perry*, 344 Md. at 211, 215-16, 686 A.2d at 277, 279; Joint Appendix at 24, *Perry v. State*, 344 Md. 204, 686 A.2d 274 (1996) (No. 119)). *Hit*

survival and wrongful death actions under Maryland law against Paladin Enterprises, Inc., and its president (collectively Paladin), alleging that Paladin aided and abetted Perry in the commission of the murders by publishing *Hit Man* and *Silencers*.²⁰³

Paladin moved for summary judgment on the theory that the First Amendment barred the imposition of civil liability for publishing books like *Hit Man* and *Silencers*.²⁰⁴ For the purposes of its motion, Paladin stipulated that Perry followed instructions in *Hit Man* and *Silencers* in planning, executing, and attempting to cover up the murders.²⁰⁵ The publisher also stipulated that it “‘intended to attract and assist criminals and would-be criminals who desire information and instructions on how to commit crimes,’” and that it “‘intended and had knowledge” that *Hit Man* “‘would be used, upon receipt, by criminals and would-be criminals to plan and execute the crime of

Man instructs the reader to establish a base at a motel near the “jobsite,” to use a rental car with stolen out-of-state license tags to reach the victim’s location, and to use a false license tag number when registering at the motel. *Id.* (citing *HIT MAN*, *supra* note 190, at 98, 101-02). Perry got a room at a nearby Days Inn, gave the motel a false license tag number, and affixed stolen out-of-state tags to his rental car before driving it to the Horns’ residence on the night of the murders. *Id.* (citing *Perry*, 344 Md. at 209, 686 A.2d at 276). *Hit Man* informs its readers how to make a disposable silencer, and how to alter the AR-7 rifle before and after the murders so that it cannot be traced. *Id.* at 240-41 (citing *HIT MAN*, *supra* note 190, at 23, 25, 39-51). It also recommends breaking down the weapon after the murders to make it easier to conceal, and disposing of the weapon by scattering the disassembled pieces along the edge of the road as one leaves the crime scene. *Id.* at 241 (citing *HIT MAN*, *supra* note 190, at 105). Perry made and used a silencer, altered the rifle in accordance with the instructions, broke down the weapon before leaving, and scattered the pieces along the road as he left the area. *Id.* at 240-41 (citing *Perry*, 344 Md. at 215-16, 686 A.2d at 280; Joint Appendix at 24, *Perry* (No. 119)). These are only some of the instructions that Perry followed. *See id.* at 239-41 (listing other examples of instructions from the book specifically followed by Perry).

203. *Rice*, 128 F.3d at 241; *Rice*, 940 F. Supp. at 838. The district court’s memorandum opinion makes clear that the plaintiffs sought to hold the defendants liable for the publication of both manuals. *Id.* (“According to the Plaintiffs, the Defendants aided and abetted the murders . . . by publishing two books which James Perry consulted to commit the murders . . .”). However, the Fourth Circuit focused primarily on the question of Defendants’ liability for publishing *Hit Man*, and largely ignored *Silencers*. *Rice*, 128 F.3d at 241 (“[T]he relatives and representatives . . . allege that Paladin aided and abetted Perry in the commission of his murders through its publication of *Hit Man*’s killing instructions.”).

The plaintiffs also sought damages based on theories of civil conspiracy, strict liability, and negligence. *Rice*, 940 F. Supp. at 838. However, the Fourth Circuit opinion deals primarily with Defendants’ liability for aiding and abetting. *See Rice*, 128 F.3d at 248 n.4 (noting that the district court did not address the plaintiffs’ negligence and strict liability claims, and so neither would the Fourth Circuit).

204. *Rice*, 128 F.3d at 241; *Rice*, 940 F. Supp. at 838.

205. *Rice*, 128 F.3d at 241. The court sets forth the full joint stipulation of facts. *Id.* at 241 n.2. It commented that these “extraordinary stipulations,” *id.* at 242, were made “in almost taunting defiance,” *id.* at 265.

murder for hire.”²⁰⁶ Paladin further stipulated that it assisted Perry in committing the murders by publishing and selling *Hit Man*.²⁰⁷

Despite Paladin's stipulations, the district court granted summary judgment in favor of Paladin, holding that *Hit Man* did not fall within the recognized exception to the “general First Amendment principles of freedom of speech” for speech that incites imminent lawless activity, or any of the other recognized exceptions.²⁰⁸ In its initial opinion, the district court found that Maryland does not recognize a cause of action for civil aiding and abetting.²⁰⁹ In response to submissions filed by both parties the very next day explaining that Maryland does recognize civil aiding and abetting, the court revised its original memorandum opinion by adding a single sentence: “Although Maryland appears to recognize aider and abetter tort liability, it has never been applied to support liability in this context.”²¹⁰

The plaintiffs argued that the publisher should be held liable if its publication of *Hit Man* manifested a “knowing or reckless disregard for human life.”²¹¹ The district court declined to adopt this standard on the ground that there was no authority for applying it in this case if the First Amendment protected the act of publishing *Hit Man*.²¹²

The court then turned to the question whether the act of publishing and distributing *Hit Man* fell within the exception to the First Amendment's general principles of free speech and free press for speech that incites imminent lawless activity.²¹³ The court applied the standard announced by the Supreme Court in *Brandenburg v. Ohio*,²¹⁴

206. *Id.* at 241 (quoting Joint Appendix, *Rice v. Paladin Enters., Inc.*, 128 F.3d 233 (4th Cir. 1997) (No. 96-2412)).

207. *Id.*

208. See *Rice*, 940 F. Supp. at 849 (finding that although *Hit Man* is “reprehensible and devoid of any significant redeeming social value,” it “does not fall within the parameters of any of the [First Amendment's] recognized exceptions”).

209. *Rice*, 128 F.3d at 250.

210. *Id.* at 250-51 (quoting Joint Appendix at 205 n.2, *Rice* (No. 96-2412)).

211. *Rice*, 940 F. Supp. at 844.

212. See *id.* (explaining that because the speech involved in the instant case was not aimed at or intended to injure the reputation of a particular individual, the *New York Times v. Sullivan* analysis did not apply).

213. *Id.* The district court noted that five classes of speech receive limited or no First Amendment protection: (1) obscenity; (2) fighting words; (3) libel; (4) commercial speech; and (5) words likely to incite imminent lawless action. *Rice*, 940 F. Supp. at 841 (citing *Miller v. California*, 413 U.S. 15, 24 (1973); *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-72 (1942); *New York Times Co. v. Sullivan*, 376 U.S. 254, 269 (1964); *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 456 (1978); *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (per curiam)).

214. 395 U.S. 444 (1969) (per curiam). In *Brandenburg*, the Supreme Court held that the First Amendment protects abstract advocacy of violent acts, but does not protect speech that is likely to produce imminent lawless activity. *Id.* at 447.

and found that *Hit Man* was protected speech because it “merely teaches” how to implement a professional hit, but “does not purport to order or command anyone to any concrete action at any specific time, much less immediately.”²¹⁵ The court also found that the book did not have a tendency to incite violence, reasoning that only one person actually used the information in the book to commit murder and that the book contained a disclaimer, “[f]or information purposes only!”²¹⁶ The family and representatives of the victims then appealed to the Fourth Circuit on the issue of whether the First Amendment protected Paladin from civil liability for publishing the manuals.²¹⁷

2. *Legal Background.*—Courts have struggled for decades with the question of what attributes bring speech that advocates unlawful action outside of the protection of the First Amendment. The Court’s earlier cases on this issue dealt with the constitutionality of statutes that criminalized certain written speech that allegedly incited unlawful action.²¹⁸ In 1969, the Supreme Court attempted to distinguish between protected and unprotected advocacy in *Brandenburg v. Ohio*.²¹⁹ In subsequent civil and criminal cases, federal appellate courts have struggled to interpret and apply *Brandenburg* in a variety of settings.²²⁰

a. *The Supreme Court Considers the Government’s Power to Criminalize Written Speech that Allegedly Incites Unlawful Conduct.*—In two early decisions, the Supreme Court considered whether the First Amendment protected written speech that allegedly incited unlawful action. In *Fox v. Washington*,²²¹ the Court held that a statute that criminalized the editing of printed matter advocating disrespect for law was not unconstitutional. The statute at issue read:

215. *Rice*, 940 F. Supp. at 847 (citing *Yakubowicz v. Paramount Pictures Corp.*, 536 N.E.2d 1067, 1071 (Mass. 1989); *McCollum v. CBS, Inc.*, 249 Cal. Rptr. 187, 193 (Ct. App. 1988)).

216. *Id.* at 848 (alteration in original) (quoting *HIT MAN*, *supra* note 190, at vi).

217. *Rice*, 128 F.3d at 241.

218. *See, e.g.*, *Winters v. New York*, 333 U.S. 507 (1948); *Fox v. Washington*, 236 U.S. 273 (1915).

219. 395 U.S. 444 (1969) (per curiam).

220. *See, e.g.*, *Herceg v. Hustler Magazine, Inc.*, 814 F.2d 1017 (5th Cir. 1987) (considering whether publishers of article that explained how to perform a dangerous activity could be held civilly liable under *Brandenburg* when a reader attempted the activity and died); *United States v. Kelly*, 769 F.2d 215 (4th Cir. 1985) (considering whether instructing people on how to avoid paying taxes by filing false returns was protected under *Brandenburg*).

221. 236 U.S. 273 (1915).

Every person who shall wilfully print, publish, edit, issue, or knowingly circulate, sell, distribute or display any book, paper, document, or written or printed matter, in any form, advocating, encouraging or inciting, or having a tendency to encourage or incite the commission of any crime, breach of the peace, or act of violence, or which shall tend to encourage or advocate disrespect for law or for any court or courts of justice, shall be guilty of a gross misdemeanor.²²²

Defendant was convicted under this statute for editing an article entitled "The Nude and the Prudes."²²³ After citing several excerpts from the article,²²⁴ the Court concluded that "by indirection, but unmistakably, the article encourages and incites a persistence in what we must assume would be a breach of the state laws against indecent exposure."²²⁵ The Court understood the state court "to have read the statute as confined to encouraging an actual breach of law."²²⁶ The Court rejected the arguments that the law was an unjustifiable restriction of liberty and unconstitutionally vague on the ground that "[i]t [did] not appear and [was] not likely that the statute [would] be construed to prevent publications merely because they tend[ed] to produce unfavorable opinions of a particular statute or of law in general." According to the Court, the statute "lays hold of encouragements that, apart from statute, if directed to a particular person's conduct, generally would make him who uttered them guilty of a misdemeanor if not

222. *Id.* at 275-76.

223. *Id.* at 276.

224. The Court's discussion of the article follows:

The printed matter in question is an article entitled, "The Nude and the Prudes," reciting in its earlier part that "Home is a community of free spirits, who came out into the woods to escape the polluted atmosphere of priest-ridden, conventional society;" that "one of the liberties enjoyed by the Homeites was the privilege to bathe in evening dress, or with merely the clothes nature gave them, just as they chose;" but that "eventually a few prudes got into the community and proceeded in the brutal, unneighborly way of the outside world to suppress the people's freedom," and that they had four persons arrested on the charge of indecent exposure, followed in two cases, it seems, by sentences to imprisonment. "And the perpetrators of this vile action wonder why they are being boycotted." It goes on: "The well-merited indignation of the people has been aroused. Their liberty has been attacked. The first step in the way of subjecting the community to all the persecution of the outside has been taken. If this was let go without resistance the progress of the prudes would be easy." It then predicts and encourages the boycott of those who thus interfere with the freedom of Home, concluding: "The boycott will be pushed until these invaders will come to see the brutal mistake of their action and so inform the people."

Id. at 276-77.

225. *Id.* at 277.

226. *Id.*

an accomplice or a principal in the crime encouraged, and deals with the publication of them to a wider and less selected audience.”²²⁷

In *Winters v. New York*,²²⁸ the Court considered the constitutionality of a statute that “forb[ade] the massing of stories of bloodshed and lust in such a way as to incite to crime against the person.”²²⁹ A book dealer was convicted of violating this statute after he was found to possess a large number of books that contained detailed stories and photographs of crimes that were supposedly obtained from police records of actual cases. A New York appellate court described the magazines as follows:

[T]he magazines are, without doubt, “devoted to the publication, and principally made up of criminal news, police reports, or accounts of criminal deeds, or pictures, or stories of deeds of bloodshed, lust and crime.” They contain a collection of crime stories which portray in vivid fashion tales of vice, murder and intrigue. The stories are embellished with pictures of fiendish and gruesome crimes, and are besprinkled with lurid photographs of victims and perpetrators. Featured articles bear such titles as “Bargains in Bodies,” “Girl Slave to a Love Cult,” and “Girls’ Reformatory”; these suggest the pattern of the literature.²³⁰

The book dealer argued that the statute violated the freedoms of speech and press because it was vague and indefinite. The Court agreed that “[s]o massed as to incite to crime” was unconstitutionally vague, reasoning that “fair use of collections of pictures and stories would be interdicted because of the utter impossibility of the actor or the trier to know where this new standard of guilt would draw the line

227. *Id.* at 277-78.

228. 333 U.S. 507 (1948).

229. *Id.* at 514. The statute provided that:

[a] person . . . who . . . [p]rints, utters, publishes, sells, lends, gives away, distributes or shows, or has in his possession with intent to sell, lend, give away, distribute or show, or otherwise offers for sale, loan, gift or distribution, any book, pamphlet, magazine, newspaper or other printed paper devoted to the publication, and principally made up of criminal news, police reports, or accounts of criminal deeds, or pictures, or stories of deeds of bloodshed, lust or crime . . . [i]s guilty of a misdemeanor.

Id. at 508 (citing N.Y. PENAL LAW § 1141(2) (Consol. 1941)). The New York Court of Appeals interpreted this statute as applicable to publications that “so massed their collection of pictures and stories of bloodshed and of lust ‘as to become vehicles for inciting violent and depraved crimes against the person.’” *Id.* at 514 (quoting *New York v. Winters*, 63 N.E.2d 98 (N.Y. 1945)). The Supreme Court considered the statute as construed by the Court of Appeals. *Id.*

230. *New York v. Winters*, 48 N.Y.S.2d 230, 231 (App. Div. 1944), *aff’d*, 63 N.E.2d 98 (N.Y. 1945), *rev’d*, 333 U.S. 507 (1948).

between the allowable and the forbidden publications.”²³¹ This was so because the statute did not require any intent or purpose, and because it was conceivable that stories of crimes or war, which were not obscene or indecent, might become so “massed” as to incite a person to commit a crime.²³² Because the statute was so vague as to criminalize innocent acts, the Court held it unconstitutional.²³³ However, the Court did say that its holding that a State could not punish by such a vague statute did not imply “that it may not punish circulation of objectionable printed matter, assuming that it is not protected by the principles of the First Amendment, by the use of apt words to describe the prohibited publications.”²³⁴ The Court also noted in dictum that “[t]he standards of certainty in statutes punishing for offenses is higher than in those depending primarily upon civil sanction for enforcement.”²³⁵

b. *The Supreme Court Attempts to Draw a Line in Brandenburg v. Ohio.*—The seminal case with regard to the First Amendment’s protection of advocacy of unlawful action is *Brandenburg v. Ohio*.²³⁶ Brandenburg, a leader of a Ku Klux Klan group, had given a speech at a rally in which he stated: “We’re not a revengent organization, but if our President, our Congress, our Supreme Court, continues to suppress the white, Caucasian race, it’s possible that there might have to be some revengeance taken.”²³⁷ He was convicted under the Ohio Criminal Syndicalism statute in part for “advocat[ing] . . . the duty, necessity, or propriety of crime, sabotage, violence, or other unlawful methods of terrorism as a means of accomplishing industrial or political reform.”²³⁸ Brandenburg challenged his conviction, arguing that the criminal syndicalism statute violated the First and Fourteenth Amendments of the United States Constitution.²³⁹ The Supreme Court agreed, holding that “the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action

231. *Winters*, 333 U.S. at 519.

232. *Id.* at 519-20.

233. *Id.* at 520 (citing *Herndon v. Lowry*, 301 U.S. 242, 259 (1937)).

234. *Id.*

235. *Id.* at 515.

236. 395 U.S. 444 (1969) (per curiam); see also *Rice*, 128 F.3d at 243 (noting that *Brandenburg* is the seminal case).

237. *Brandenburg*, 395 U.S. at 446.

238. *Id.* at 444-45 (alteration in original) (omission in original) (quoting OHIO REV. CODE ANN. § 2923.13).

239. *Id.* at 445.

and is likely to incite or produce such action.”²⁴⁰ The court distinguished between “preparing a group for violent action and steeling it to such action” and “the mere abstract teaching . . . of the moral propriety or even moral necessity for a resort to force and violence.”²⁴¹ The Ohio statute was unconstitutional because it failed to draw this distinction and thus swept “within its condemnation speech which our Constitution has immunized from governmental control.”²⁴²

Four years later in *Hess v. Indiana*,²⁴³ the Supreme Court refined the standard announced in *Brandenburg*.²⁴⁴ Gregory Hess was convicted for disorderly conduct during an antiwar demonstration on the campus of Indiana University.²⁴⁵ In the course of the demonstration, the sheriff and his deputies began walking up a street to clear student-demonstrators who had gathered there.²⁴⁶ Hess was standing off the street when the sheriff passed him and heard him say “fuck.”²⁴⁷ It was later stipulated that Hess said either “We’ll take the fucking street later,” or “We’ll take the fucking street again.”²⁴⁸ The uncontradicted testimony of two witnesses established that Hess did not appear to be exhorting the crowd to go back into the street and that his statement did not appear to be addressed to any particular group or person.²⁴⁹ The Indiana Supreme Court upheld the conviction based on the trial court’s finding that Hess’s statement “‘was intended to incite further lawless action on the part of the crowd in the vicinity of appellant and was likely to produce such action.’”²⁵⁰

The Supreme Court reversed, holding that the First Amendment protected Hess’s speech because, “at worst, it amounted to nothing more than advocacy of illegal action at some indefinite future time.”²⁵¹ The Court emphasized the imminence requirement of *Brandenburg*, reasoning that “since there was no evidence, or rational inference from the import of the language, that his words were intended to

240. *Id.* at 447.

241. *Id.* at 448 (omission in original) (quoting *Noto v. United States*, 367 U.S. 290, 297-98 (1961)). Although the Fourth Circuit in *Rice* ultimately decided that the district court had misread *Brandenburg*, it explained that it could not fault the lower court because “[t]he short *per curiam* opinion in *Brandenburg* is, by any measure, elliptical.” *Rice*, 128 F.3d at 264.

242. *Brandenburg*, 395 U.S. at 448.

243. 414 U.S. 105 (1973) (*per curiam*).

244. See *supra* notes 236-241 and accompanying text.

245. *Hess*, 414 U.S. at 105-06.

246. *Id.* at 106.

247. *Id.* at 106-07.

248. *Id.* at 107 (internal quotation marks omitted).

249. *Id.*

250. *Id.* at 108 (quoting *Hess v. State*, 297 N.E.2d 413, 415 (Ind.), *rev’d*, 414 U.S. 105 (1973) (*per curiam*)).

251. *Id.*

produce, and likely to produce, *imminent* disorder, those words could not be punished by the State on the ground that they had 'a tendency to lead to violence.'"²⁵² The Court also noted that, because the uncontroverted evidence showed that Hess's statement was not directed to anyone, it could not be said that he was advocating any action.²⁵³

The Ninth Circuit downplayed the importance of *Brandenburg's* imminence requirement in *United States v. Barnett*,²⁵⁴ a case in which the publisher of instruction materials about manufacturing illegal drugs was charged with criminal aiding and abetting.²⁵⁵ After the district court suppressed the instructional materials, the Government appealed.²⁵⁶ The publisher argued that the First Amendment protected his sale of written instructions for the manufacture of illegal drugs.²⁵⁷

The Ninth Circuit disagreed.²⁵⁸ The court first rejected the publisher's contention that the First Amendment provides a defense simply because the defendant used words to commit a crime.²⁵⁹ It asserted that publishing and selling an instructional manual on manufacturing drugs was similar to "[t]he use of a printed message to a bank teller requesting money coupled with a threat of violence, the placing of a false representation in a written contract, the forging of a check, and the false statement to a government official, [all of which] are all familiar acts which constitute crimes despite the use of speech as an instrumentality for the commission thereof."²⁶⁰ Although the court did not specifically cite *Brandenburg*, it did rely on the case of *United States v. Buttorff*.²⁶¹ In *Buttorff*, the Eighth Circuit, referring to *Brandenburg*, held that the First Amendment did not bar the conviction for aiding and abetting of individuals who gave speeches on how to file false tax returns because "defendants [went] beyond mere advocacy of tax reform," even though "the speeches . . . [did] not incite the type of imminent lawless activity referred to in criminal syndicalism cases."²⁶² The Ninth Circuit stated that "[t]o the extent, however, that Barnett appears to contend that he is immune from search or prosecution because he uses the printed word in encouraging and

252. *Id.* at 109 (quoting *Hess*, 297 N.E.2d at 415).

253. *Id.* at 108-09.

254. 667 F.2d 835 (9th Cir. 1982).

255. *Id.* at 842-43.

256. *Id.* at 837.

257. *Id.* at 842.

258. *Id.*

259. *Id.*

260. *Id.* at 842.

261. *Id.* at 842-43 (citing *United States v. Buttorff*, 572 F.2d 619 (8th Cir. 1978)).

262. *Id.* at 842.

counseling others in the commission of a crime, we hold expressly that the first amendment does not provide a defense as a matter of law to such conduct.”²⁶³ The court also noted that the defendants in *Buttorff* “had virtually no personal contact with the persons who filed false income tax returns,” and concluded that it was irrelevant that the publisher in the case sub judice had not met with the person who used the manual to manufacture drugs.²⁶⁴

In 1985, the Fourth Circuit applied the *Brandenburg* distinction in *United States v. Kelley*,²⁶⁵ a case in which a defendant challenged, on First Amendment grounds, his conviction for aiding and abetting in the preparation of false W-4 forms.²⁶⁶ Kelley was the organizer and leader of a group called the Constitutional Tax Association, which asserted that the federal income tax is unconstitutional as applied to wages.²⁶⁷ In exchange for payment of dues, Kelley instructed members of the group how to prevent taxes from being withheld from wages and how to obtain refunds of previously withheld wages.²⁶⁸ He gave the members detailed instructions on how to fill out W-4 and refund claim forms.²⁶⁹ He further instructed members to report zero wages on their 1040A income tax return forms, and to destroy their credit cards and use only cash in order to avoid leaving paper trails that could be followed by the IRS.²⁷⁰ If an employer refused to honor the claimed exemption without reporting it to the IRS, Kelley told the members that they should claim twelve dependents.²⁷¹ Kelley explained that employers were required to report to the IRS if an employee claimed fourteen dependents, but probably would not do so if an employee claimed only twelve.²⁷²

The Fourth Circuit rejected Kelley’s argument that his instructions were protected by the First Amendment, describing this argument as “frivolous.”²⁷³ Citing *Brandenburg*, the court held that “[t]he cloak of the First Amendment envelops critical, but abstract, discussions of existing laws, but lends no protection to speech which urges

263. *Id.* at 843.

264. *Id.*

265. 769 F.2d 215 (4th Cir. 1985).

266. *Id.* at 217.

267. *Id.* at 216.

268. *Id.*

269. *Id.*

270. *Id.*

271. *Id.*

272. *Id.*

273. *Id.* at 217.

the listeners to commit violations of current law."²⁷⁴ The court noted that Kelley's speech was not "abstract criticism" of the law or a plea for his listeners to seek legislative action to change the law;²⁷⁵ "[i]nstead, [his listeners] were urged to file false returns, with every expectation that the advice would be heeded."²⁷⁶ Other circuits have reached the same conclusion.²⁷⁷

Two years later in *Herceg v. Hustler Magazine, Inc.*,²⁷⁸ the Fifth Circuit considered whether a magazine could be held liable for publishing an article describing the technique and pleasure associated with a sex act that ultimately resulted in the accidental death of a teenager.²⁷⁹ As part of a series on unusual sexual practices, *Hustler Magazine* printed *Orgasm of Death*, an article about autoerotic asphyxia.²⁸⁰ This practice entails masturbating while "hanging" oneself in order to momentarily cut off the blood supply to the brain at the moment of climax.²⁸¹ The article detailed how the act is performed and the sexual pleasure associated with it.²⁸² The heading of the article identified it as part of a series of discussions on "sexual pleasures [that] have remained hidden for too long behind the doors of fear, ignorance, inexperience and hypocrisy," presented "to increase [readers'] sexual knowledge, to lessen [their] inhibitions and—ultimately—to make [them] much better lover[s]."²⁸³ The editor's note preceding the article stated: "Hustler emphasizes the often-fatal dangers of the practice of 'auto-erotic asphyxia,' and recommends that readers seeking unique forms of sexual release DO NOT ATTEMPT this method. The facts are presented here solely for an educational purpose."²⁸⁴ Moreover, the two-page article contained at least ten warnings that the practice is dangerous and deadly.²⁸⁵

Tragically, a fourteen-year-old adolescent named Troy D. read the article and attempted the technique.²⁸⁶ His nude body was discov-

274. *Id.* (citing *Brandenburg v. Ohio*, 395 U.S. 444 (1969) (per curiam); *United States v. Buttorff*, 572 F.2d 619 (8th Cir. 1978)).

275. *Id.*

276. *Id.*

277. *See, e.g.*, *United States v. Rowlee*, 899 F.2d 1275 (2d Cir. 1990); *United States v. Moss*, 604 F.2d 569 (8th Cir. 1979); *Buttorff*, 572 F.2d 619.

278. 814 F.2d 1017 (5th Cir. 1987).

279. *Id.* at 1018-19 (describing the facts giving rise to the issues presented in the case).

280. *Id.* at 1018.

281. *Id.*

282. *Id.*

283. *Id.* (alterations in original) (internal quotation marks omitted).

284. *Id.* (internal quotation marks omitted).

285. *Id.* at 1018-19.

286. *Id.* at 1019.

ered the next morning, hanging by the neck in a closet.²⁸⁷ A copy of the magazine, opened to *Orgasm of Death*, was found near his feet.²⁸⁸ Troy's mother and the friend who found his body sued Hustler, alleging that the article incited Troy to perform the act that resulted in his death.²⁸⁹ A jury found Hustler liable for \$182,000 in actual and exemplary damages.²⁹⁰

On appeal, the Fifth Circuit reversed the judgment entered on the jury verdict.²⁹¹ The court held that *Orgasm of Death* was entitled to First Amendment protection under *Brandenburg*.²⁹² The plaintiffs argued that the article constituted "incitement" because it provided "unnecessary detail" about how to accomplish autoerotic asphyxiation.²⁹³ The court rejected this argument, noting that the technique "apparently is not complicated" and that the detail contained in the article was taken from an article published in the *Journal of Child Psychiatry*.²⁹⁴ However, the majority did observe that "it is conceivable that, in some instances, the amount of detail contained in challenged speech may be relevant in determining whether incitement exists."²⁹⁵ Finally, the majority questioned whether *Brandenburg* should ever be applied to written material, or whether the incitement exception should be limited to speech made to crowds.²⁹⁶ Although the court did not reach the question of whether written material might ever be found to be incitement unprotected by the First Amendment, it did note that "[i]ncitement cases usually concern a state effort to punish the arousal of a crowd to commit a criminal action" and that "[t]he root of incitement theory appears to have been grounded in concern over crowd behavior."²⁹⁷

In a separate opinion, Judge Jones "vigorously" dissented from the majority's conclusion that *Orgasm of Death* was protected speech.²⁹⁸ Although she acknowledged that the article does not fit conveniently into one of the exceptions to the First Amendment's general princi-

287. *Id.*

288. *Id.*

289. *Id.*

290. *Id.*

291. *Id.* at 1025.

292. *Id.* at 1023. The majority reasoned that "no fair reading of [the article] can make its content advocacy, let alone incitement to engage in the practice" of autoerotic masturbation. *Id.*

293. *Id.*

294. *Id.*

295. *Id.*

296. *See id.*

297. *Id.*

298. *Id.* at 1030 (Jones, J., concurring and dissenting).

ples of free speech, she asserted that "no federal court has held that death is a legitimate price to pay for freedom of speech."²⁹⁹ Judge Jones argued that "*Hustler* is not a bona fide competitor in the 'marketplace of ideas,'" and should be entitled to less First Amendment protection than the "public advocacy of controversial political ideas" protected in *Brandenburg*.³⁰⁰

The Court of Special Appeals of Maryland briefly addressed the question whether the First Amendment applies to acts that constitute criminal aiding and abetting in *Handy v. State*.³⁰¹ In *Handy*, the defendants challenged their convictions for aiding and abetting violations of Maryland's bookmaking laws through telephone conversations with gamblers.³⁰² The court rejected defendant's argument that their convictions infringed on the guarantees of free speech found in the United States Constitution and Article 40 of the Maryland Declaration of Rights, observing that it was "aware of no authority holding that speech which aids or abets the commission of a crime is within the protection of the constitutional guarantees."³⁰³

By the time the *Rice* case reached the Fourth Circuit, the courts had accepted the proposition that the First Amendment does not prevent criminal aiding and abetting, but had only begun to apply this exception to civil suits over written speech.

3. *The Court's Reasoning.*—In *Rice v. Paladin Enterprises*, the Fourth Circuit held that the First Amendment did not prevent a publisher of a book that encouraged and instructed readers on the commission of murder for hire from being held liable for civil aiding and abetting when a reader followed the instructions and killed three people.³⁰⁴

The Fourth Circuit reversed the district court's grant of summary judgment to *Paladin*, and remanded the case for trial.³⁰⁵ The court began its opinion by reviewing First Amendment jurisprudence, start-

299. *Id.* at 1026.

300. *Id.* at 1029 (explaining that because *Hustler* borders on obscene and its pornography is used for its effect rather than for the transmission of ideas, it should be entitled to only limited First Amendment protection).

301. 23 Md. App. 239, 326 A.2d 189 (1974).

302. *See id.* at 240-41, 326 A.2d at 190 (describing the charges upon which appellants were convicted and presently appeal).

303. *Id.* at 254, 326 A.2d at 198. Article 40 of the Maryland Declaration of Rights provides, in pertinent part, "that every citizen of the State ought to be allowed to speak, write and publish his sentiments on all subjects." MD. CODE ANN., CONST., DECL. OF RTS. art. 40 (1981).

304. *Rice*, 128 F.3d at 265.

305. *Id.* at 243.

ing with *Brandenburg*, and then discussing the extent of the government's power to regulate conduct that contains elements of speech.³⁰⁶ The court then observed that several circuits, including the Fourth Circuit, have held that the First Amendment does not necessarily bar the imposition of criminal liability for aiding and abetting the commission of a crime, "even when such aiding and abetting takes the form of the spoken or written word."³⁰⁷

The court then set forth two possible qualifications to this general rule, but decided that neither was important for the resolution of the present issue.³⁰⁸ First, the court observed that the First Amendment may impose a heightened intent requirement for liability in order to avoid a chilling effect on protected speech.³⁰⁹ Specifically, the court suggested that "in order to prevent the punishment or even the chilling of entirely innocent, lawfully useful speech, the First Amendment may in some contexts stand as a bar to the imposition of liability on the basis of mere foreseeability or knowledge that the information one imparts could be misused for an impermissible purpose."³¹⁰ However the court also insisted that an intent requirement "would not relieve from liability those who would, for profit or other motive, intentionally assist and encourage crime and then shamelessly seek refuge in the sanctuary of the First Amendment."³¹¹ The court observed that the First Amendment does not protect speech where the speaker

306. See *id.* at 243-44 (discussing "speech-act doctrine"). The court cited the "speech-act doctrine" several times to refer to the principle that certain unlawful acts can be punished without violating the First Amendment even though the act was accomplished through speech. See *id.* at 244, 247, 263 n.9.

307. See *id.* at 244-46 (surveying cases in which the federal circuit courts have held that the First Amendment is not necessarily a defense to criminal liability for aiding and abetting a crime through publication or instruction). The court cited *United States v. Kelley*, 769 F.2d 215, 217 (4th Cir. 1985), which held that the First Amendment does not bar prosecution for criminal aiding and abetting for orally instructing members of a group on how to avoid paying taxes through filing falsified tax returns. The court also discussed *United States v. Barnett*, 667 F.2d 835, 843 (9th Cir. 1982), in which the Ninth Circuit held that the First Amendment does not bar prosecution for aiding and abetting a crime through the publication and distribution of instructions on how to make illegal drugs.

308. *Rice*, 128 F.3d at 247.

309. *Id.*

310. *Id.*

311. *Id.* at 248. The court warned that if the First Amendment was construed to protect people who intentionally assisted criminals,

one could publish, by traditional means or even on the internet, the necessary plans and instructions for assassinating the President, for poisoning a city's water supply, for blowing up a skyscraper or public building, or for similar acts of terror and mass destruction, with the specific, indeed even the admitted, purpose of assisting such crimes—all with impunity.

Id.

has a specific intent to assist and encourage the commission of a crime.³¹² It then concluded that it did not matter whether the First Amendment required an "intent-based limitation" because the stipulations and the facts of the case at hand were sufficient to show specific intent and the court was "confident that the First Amendment pose[d] no bar to the imposition of civil . . . liability for speech acts which the plaintiff . . . can establish were undertaken with specific, if not criminal, intent."³¹³ Second, the court suggested that *Brandenburg* might (and probably would) bar the imposition of civil liability for abstract advocacy that is not directed to inciting imminent unlawful action, just as it bars criminal prosecution of such speech.³¹⁴ The court concluded that an exhausted analysis of this probable limitation was not required because the facts permitted a jury to find that *Hit Man* was the kind of advocacy that the *Brandenburg* Court decided was not protected by the First Amendment.³¹⁵

The Fourth Circuit next reviewed the district court's rationale in granting summary judgment. It attributed the lower court's decision to its initial failure to realize that Maryland recognizes a civil cause of action for aiding and abetting, and the district court's apparent unwillingness to revisit its decision after the parties pointed out its mistake.³¹⁶

The Fourth Circuit decided that Maryland's civil and criminal laws regarding aiding and abetting differed with regard to the intent requirement.³¹⁷ The court cited an opinion by Judge Learned Hand

312. *Id.*

313. *Id.* Paladin explained to the district court that when it said it intended that its publications would be used by criminals to commit murder, it meant only that it "knew" that the books would be used by some purchasers for that purpose. *Id.* at 253. The district court accepted this clarification and found that this intent was not enough for liability. *Rice v. Paladin Enters., Inc.*, 940 F. Supp. 836, 846 (1996) (mem.), *rev'd*, 128 F.3d 233 (4th Cir. 1997), *cert. denied*, 118 S. Ct. 1515 (1998). The Fourth Circuit disagreed, observing that Paladin had no power to unilaterally alter the parties' joint stipulation of facts, which stated that Paladin "provided its assistance to Perry with *both* the knowledge *and* the intent that the book would immediately be used by criminals" to commit the crime of murder for hire). *Rice*, 128 F.3d at 248, 253.

314. *Rice*, 128 F.3d at 248-49.

315. *See id.* at 249-50 (noting that the speech contained in *Hit Man* is "a textbook example of the type of speech that the Supreme Court has quite purposely left unprotected").

316. *Id.* at 250-51. Maryland does recognize aider and abettor tort liability. *See Alleco, Inc. v. Harry & Jeanette Weinberg Found., Inc.*, 340 Md. 176, 199, 665 A.2d 1038, 1049 (1995) (noting that "Maryland has expressly recognized aider and abettor tort liability"); *Duke v. Feldman*, 245 Md. 454, 457, 226 A.2d 345, 347 (1967), (holding that "[a] person may be held liable as a principal for assault and battery if he, by any means (words, signs, or motions) encouraged, incited, aided or abetted the act of the direct perpetrator of the tort" (citations omitted)).

317. *Id.* at 251.

in which the judge determined that civil liability for aiding and abetting requires only that the criminal conduct be the “natural consequence of [one’s] original act,” while criminal liability for aiding and abetting required that the defendant have a “purposive attitude” toward the commission of the crime.³¹⁸ Citing no Maryland law, the *Rice* court “assume[d] that Maryland prescribes a higher intent standard for the imposition of criminal liability than it does for civil liability.”³¹⁹

The court suggested—but did not decide—that the First Amendment might impose a heightened intent standard for civil aiding and abetting beyond that required by Maryland law.³²⁰ The court then held that Plaintiffs had established a genuine issue of material fact as to Paladin’s intent even under such a heightened standard, with or without Paladin’s stipulation.³²¹ It then identified four bases, apart from Paladin’s stipulations, on which, “collectively, if perhaps not individually,” a jury could find the intent required by a heightened First Amendment standard.³²² First, the jury could find that the declared purpose of *Hit Man* is to facilitate murder and thus conclude that the publisher intended to assist in achieving that purpose.³²³ Second, the jury could find the requisite intent from the “unique text of *Hit Man* alone, [which] boldly proselytiz[es] and glamoriz[es] the . . . ‘profession’ of murder as it dispassionately instructs on its commission.”³²⁴ Third, the jury could infer the requisite intent from Paladin’s marketing strategy, based on the publisher’s description of the book in its own sales catalogue.³²⁵ Fourth, the jury could infer intent by finding that *Hit Man*’s only genuine use is to facilitate murders.³²⁶

318. *Id.* (alteration in original) (quoting *United States v. Peoni*, 100 F.2d 401, 402 (2d Cir. 1938)).

319. *Id.*

320. *Id.* at 252.

321. *Id.* at 252, 253 (“[E]ven if the stipulation only established knowledge, summary judgment was yet inappropriate because a trier of fact could still conclude that Paladin acted with the requisite intent to support civil liability.”).

322. *Id.* at 253.

323. *Id.* The court found this purpose declared by the book’s subtitle, “A Technical Manual for Independent Contractors,” and its description of itself as “an instruction book on murder.” *Id.* (quoting *HIT MAN*, *supra* note 190, at ix).

324. *Id.* at 253-54.

325. *Id.* at 254. The description read: “Learn how a pro gets assignments, creates a false identity, makes a disposable silencer, leaves the scene without a trace, watches his mark unobserved and more. Feral reveals how to get in, do the job and get out without getting caught. *For academic study only!*” *Id.* (quoting 26 PALADIN PRESS CATALOGUE, No. 2, at 41). The court decided that “a jury could readily find [the italicized disclaimer] to be transparent sarcasm designed to intrigue and entice.” *Id.*

326. *Id.* at 255.

The court next distinguished *Hit Man* from the abstract advocacy typically protected by the First Amendment.³²⁷ Chapter by chapter, the court pointed out the specific detail with which the book instructed the reader on how to solicit, plan, execute, and cover up a contract killing.³²⁸ The court then cited examples of *Hit Man's* language that "steels its readers to the particular violence it explicates, instilling in them the resolve necessary to carry out the crimes it details, explains, and glorifies," and noted that such language, "uncanny in its directness and power, pervades the entire work."³²⁹ The court held that "[t]he Supreme Court has never protected as abstract advocacy speech so explicit in its palpable entreaties to violent crime."³³⁰

The Fourth Circuit then found that the district court misread *Brandenburg* as having distinguished between mere teaching or advocacy of lawlessness and inciting or encouraging lawlessness, and observed that the Supreme Court held that "mere *abstract* teaching" was protected, not "mere teaching."³³¹ The court stated: "[I]t is not teaching simpliciter, but only 'the mere *abstract* teaching . . . of the moral propriety or even moral necessity' for resort to lawlessness or its equivalent, that is protected under the commands of *Brandenburg*."³³² The court noted that *Brandenburg* had also distinguished between "mere abstract teaching" and the "prepar[ation] [of] a group for violent action and steeling it to such action."³³³ It concluded that the Supreme Court probably meant to imply that one prepares and steels others for violent action "only when he does so through speech that is 'directed to inciting or producing imminent lawless action and . . . [that is] likely to produce such action,'" and that therefore preparing and steeling are not per se unprotected by the First Amendment.³³⁴ However, the Fourth Circuit then concluded that the Supreme Court only meant for the First Amendment to protect preparation and steel-

327. See *id.* at 256 ("[I]t is evident from even a casual examination of the book that the prose of *Hit Man* is at the other end of the continuum from the ideation at the core of the advocacy protected by the First Amendment.").

328. See *id.* at 256-61.

329. *Id.* at 261-62.

330. *Id.* at 263.

331. *Id.* at 263-64 (emphasis added) ("In the final analysis, it appears the district court simply failed to fully appreciate the import of the qualification to the kind of 'teaching' that the Supreme Court held to be protected in *Brandenburg*.").

332. *Id.* (omission in original) (quoting *Noto v. United States*, 367 U.S. 290, 297-98 (1961)).

333. *Id.* at 264 (alterations in original) (quoting *Brandenburg v. Ohio*, 395 U.S. 444, 448 (1969)).

334. *Id.* (alteration in original) (omission in original) (quoting *Brandenburg*, 395 U.S. at 447).

ing when the speech was *advocacy*, which the court defined as “speech that was part and parcel of political and social discourse.”³³⁵ The court observed that “to understand the [Supreme] Court as addressing itself to speech other than advocacy would be to ascribe to it an intent to revolutionize the criminal law . . . by subjecting prosecutions to the demands of *Brandenburg*’s ‘imminence’ and ‘likelihood’ requirements whenever the predicate conduct takes . . . the form of speech—an intent that no lower court has discerned and that . . . we would hesitate to impute to the Supreme Court.”³³⁶ One of the confusing features of the court’s opinion is that although it indicated that *Hit Man* satisfied the “imminence” and “likelihood” requirements of the *Brandenburg* exception to the First Amendment,³³⁷ it here suggests that *Hit Man* might not be subject to these requirements if it is not “advocacy,” i.e., if it is not “part and parcel of political and social discourse.”³³⁸ The court then concluded that the plaintiffs stated a cause of action for civil aiding and abetting sufficient to withstand summary judgment and that this cause of action was not barred by the First Amendment.³³⁹

Finally, the court addressed concerns raised by *Paladin* and numerous *amici*³⁴⁰ that exempting *Hit Man* from First Amendment protection would have a far-reaching chilling effect on the exercise of freedom of speech by other media entities.³⁴¹ The court asserted that

335. *Id.*

336. *Id.* at 265.

337. See *supra* notes 314-315 and accompanying text (discussing court’s conclusion that *Hit Man* would meet requirements of *Brandenburg* exception).

338. See text accompanying *supra* notes 335-336.

339. *Rice*, 128 F.3d at 265.

340. *Amici curiae* urging affirmance included ABC, Inc.; America Online, Inc.; the Association of American Publishers; The Baltimore Sun Co.; the E.W. Scripps Co.; the Freedom to Read Foundation; the Magazine Publishers of America, Inc.; McClatchy Newspapers, Inc.; Media General, Inc.; Media Professional Insurance; the National Association of Broadcasters; the Newspaper Association of America; the New York Times; The Reporters Committee for Freedom of the Press; the Society of Professional Journalists; and the Washington Post Co. [hereinafter collectively the *Media Amici*], as well as The Horror Writers Association; The Thomas Jefferson Center for the Protection of Free Expression; the American Civil Liberties Union Foundation; the American Civil Liberties Union of the National Capitol Area; and the American Civil Liberties Union of Colorado. *Id.* at 233.

341. *Id.* at 265. See, e.g., Brief of Amici Curiae in Support of Affirmance at 22, *Rice v. Paladin Enters., Inc.*, 128 F.3d 233 (4th Cir. 1997) (No. 96-2412) (warning that “[a] decision that allows this claim to survive—even for a brief time—will have a destabilizing effect on First Amendment law” and that no form of expression will “be safe from civil liability”); Brief Amicus Curiae in Support of Affirmance on Behalf of The Horror Writers Ass’n at 9, *Rice v. Paladin Enters., Inc.*, 128 F.3d 233 (4th Cir. 1997) (No. 96-2412) (declaring that deeming *Hit Man* unprotected speech “would be to sanction the chilling and silencing of writers and publishers through tort litigation”).

its holding would not subject news reports, works of fiction, or even instructional manuals that do not teach activity that is criminal per se to civil aider and abetter liability.³⁴²

The Fourth Circuit observed that it had found no case that it regarded as factually analogous to *Rice*, and that a number of features of that case made it "unique in the law."³⁴³ These features were:

Paladin's astonishing stipulations, coupled with the extraordinary comprehensiveness, detail, and clarity of *Hit Man*'s instructions for criminal activity and murder in particular, the boldness of its palpable exhortation to murder, the alarming power and effectiveness of its peculiar form of instruction, the notable absence from its text of the kind of ideas for the protection of which the First Amendment exists, and the book's evident lack of any even arguably legitimate purpose beyond the promotion and teaching of murder³⁴⁴

The Fourth Circuit attributed importance to the level of detail in *Hit Man*.³⁴⁵ It noted that *Brandenburg* protected "mere abstract teaching," but not necessarily "mere teaching" as the district court had concluded.³⁴⁶ After quoting extensively from the book, the court observed that:

342. See *Rice*, 128 F.3d at 265-67 (addressing the slippery slope argument presented by Paladin and the Media amici).

343. *Id.* at 267.

344. *Id.*

345. *Id.*; cf. *Herceg v. Hustler Magazine, Inc.*, 814 F.2d 1017, 1023 (5th Cir. 1987) (finding that the detail in the material at issue was insufficient to establish incitement, in part because the article also contained at least ten warnings that autoerotic asphyxiation was dangerous and often fatal). By contrast, the advertisement for *Hit Man* and the 130-page book itself contain only three disclaimers, all of which do little more than state that the publisher does not intend for the reader to actually use the instructions therein to kill. See *Rice*, 128 F.3d at 263 n.10 (describing the disclaimers involving *Hit Man* as "insufficient in themselves to alter the objective understanding of the hundreds of thousands of words that follow"). The Fourth Circuit found that these disclaimers were used to titillate rather than to dissuade readers. *Id.* However, as the dissenting judge in *Herceg* observed, the warnings in *Orgasm of Death* could also titillate readers. See *Herceg*, 814 F.2d at 1026 (Jones, J., concurring and dissenting) (explaining that the warnings may be seen "as invitations rather than taboos").

The important difference between the *Hit Man* disclaimers and the warnings in the *Hustler* article was that the latter actually gave readers a reason not to engage in the practice, i.e., the risk of death, and therefore constituted warnings. In contrast, the disclaimers in *Hit Man* offered no reason why the readers should not engage in the activity, and in fact did little more than supply Paladin with a basis for later arguing to a court that it could not be held responsible for the crimes of its readers.

346. *Rice*, 128 F.3d at 263.

Hit Man's detailed, concrete instructions and adjurations to murder stand in stark contrast to the vague, rhetorical threats of politically or socially motivated violence that have historically been considered part and parcel of the impassioned criticism of laws, policies, and government indispensable in a free society and rightly protected under *Brandenburg*.³⁴⁷

The court observed that *Hit Man's* "powerful prose" stemmed, in part, from the style of the writing.³⁴⁸ *Hit Man* is written in the second person;³⁴⁹ for example, "After *you* have tested *your* poisons for effectiveness and established *your* favorites *you* are ready to go to work."³⁵⁰ Many of the instructions are written in the imperative voice,³⁵¹ such as, "Hide, bury, burn, toss—but, in any event, do away with every tool and article of clothing that was near the scene of the crime."³⁵² The court noted that these formal aspects were used to encourage readers in their specific acts of murder.³⁵³

The court's determination was also influenced by the book's reassurance of the would-be murderer, and its glorification of the "profession."³⁵⁴ The book reassures the reader that he or she will not feel guilt after the killing or be plagued by lingering fears of discovery.³⁵⁵ It also reassures the reader that "we [as killers] can rest assured that the law is on our side" and that a "true professional" "won't ever have to face [various] legal predicaments."³⁵⁶ The book glorified the "profession" by tying it to the reader's manhood and by assuring him that he will feel superior to other people after his first kill.³⁵⁷ Furthermore, the court found that the book "is so effectively written that its protagonist seems actually to be present at the planning, commission, and cover-up of the murders the book inspires."³⁵⁸ The court noted

347. *Id.* at 262.

348. *Id.* at 252.

349. *Id.*

350. *HIT MAN*, *supra* note 190, at 62 (emphasis added).

351. *Rice*, 128 F.3d at 252.

352. *HIT MAN*, *supra* note 190, at 105.

353. *Rice*, 128 F.3d at 252; *see also supra* note 196 and accompanying text (quoting exemplary passages from *Hit Man*).

354. *Rice*, 128 F.3d at 252.

355. *Id.* at 261-62 (citing *HIT MAN*, *supra* note 190, at 106-08).

356. *Id.* at 262 (alterations in original) (citing *HIT MAN*, *supra* note 190, at 125, 130).

357. *See supra* note 196 and accompanying text (quoting passages from *Hit Man*).

358. *Rice*, 128 F.3d at 252. The court quoted the following excerpt that takes place after the murderer completes his first killing as illustrative of the "criminal partnership" between *Hit Man* and its readers:

that these features distinguished *Hit Man* from a book that "merely detail[s] how to commit murder and murder for hire."³⁵⁹

The court also asserted that a "political, informational, educational, entertainment, or other wholly legitimate purpose" would be apparent and demonstrable whenever a crime is described or depicted in "copycat" cases.³⁶⁰ The court recognized that the speech that gives rise to "copycat" crimes often does so by incidentally glamorizing the criminal activity, but the court asserted that, with few if any exceptions, such speech would not directly and affirmatively promote the criminal activity in a way that would permit an inference of the requisite intent.³⁶¹

The Fourth Circuit's determination that the absence of a legitimate, lawful purpose for a book could support a finding that the publisher intended it to be used for an unlawful purpose imports a standard that originated in the law of obscenity.³⁶² The court cited *Miller v. California*,³⁶³ in which the Supreme Court distinguished protected non-obscene speech from unprotected obscene speech in part on the basis of "whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value."³⁶⁴ In other words, material that appeals to the prurient interest would still be protected by the First Amendment if it had some legitimate value. Similarly, the effect of the Fourth Circuit's holding is that a book that is likely to produce or incite imminent lawless activity may still be protected by the First Amendment if there are other legitimate purposes because these purposes could prevent a jury finding that the publisher had the requisite heightened intent.

I'm sure your emotions have run full scale over the past few days or weeks.

There was a fleeting moment just before you pulled the trigger when you wondered if lightning would strike you then and there. And afterwards, a short burst of panic as you looked quickly around you to make sure that no witnesses were lurking.

But other than that you felt *absolutely nothing*. And you are shocked by that nothingness. You had expected this moment to be a spectacular point in your life
. . . .

The first few seconds of nothingness give you an almost uncontrollable urge to laugh out loud. You break into a wide grin. Everything you have been taught about life and its value was a fallacy.

Id. (quoting *HIT MAN*, *supra* note 190, at 107).

359. *Id.*

360. *Id.* at 266.

361. *Id.*

362. *Id.* at 255.

363. 413 U.S. 15 (1973).

364. *Rice*, 128 F.3d at 255 (quoting *Miller*, 413 U.S. at 24).

4. *Analysis.*—This case pits society's strong interest in safeguarding the guarantees of free speech and free press enshrined in our Constitution against the State's interest in preventing its citizens from killing one another, as well as the State's interest in compensating victims.³⁶⁵ In the course of its decision, the court uncovered some of the difficulties in applying *Brandenburg* to books like *Hit Man*.³⁶⁶ It also discussed a possible heightened intent requirement for imposing civil liability for torts arising out of speech and what this requirement might be for different kinds of speech.³⁶⁷ Unfortunately, however, the lasting legacy of the *Rice* opinion may be its reduction of First Amendment protection for recorded speech.³⁶⁸

a. *Brandenburg has Little Precedential Value for Written Works Like Hit Man.*—The court held that *Hit Man* fit within the *Brandenburg* exception to the general First Amendment principle of free speech and free press even as it questioned whether *Brandenburg* should apply.³⁶⁹ The court was right to raise this issue, because *Hit Man* does not fit well into the kind of advocacy that *Brandenburg* protects, or the exception that it creates.³⁷⁰ *Brandenburg* and its progeny recognized that advocacy of violence was protected in the context of efforts to bring about social and political change so long as the speech did not

365. The district court observed that it had the "novel and awesome" task of "balanc[ing] society's interest in compensating injured parties against the freedom of speech guaranteed by the First Amendment." *Rice v. Paladin Enters., Inc.*, 940 F. Supp. 836, 840 (D. Md. 1996) (mem.), *rev'd*, 128 F.3d 233 (4th Cir. 1997), *cert. denied*, 118 S. Ct. 1515 (1998). Of course, the imposition of civil liability is also intended to deter the harm. See W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 4, at 25 (5th ed. 1984) (explaining that "one reason for imposing liability is the deliberate purpose of providing that incentive [of preventing the occurrence of the harm]").

366. See *infra* notes 369-380 and accompanying text (discussing problems with applying *Brandenburg* to works like *Hit Man*).

367. See *infra* notes 381-390 and accompanying text (analyzing court's discussion of possible intent requirements).

368. See *infra* notes 390-424 and accompanying text (discussing the danger that other forms of recorded speech will be endangered by *Rice*).

369. See *Rice*, 128 F.3d at 246-47, 262-65 (noting prior to its in-depth discussion of *Brandenburg* that the concrete advocacy of lawlessness urged in *Hit Man* has never been protected by the Supreme Court as abstract advocacy speech); text accompanying *supra* notes 337-338 (noting that the court had indicated that *Hit Man* satisfied the imminence and likelihood requirements of the *Brandenburg* exception, but then suggested that these requirements might not apply because *Hit Man* might not be the kind of "advocacy" protected by *Brandenburg*).

370. See *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (per curiam) (holding that "the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action").

advocate imminent lawful activity or was unlikely to produce such imminent unlawful activity.³⁷¹ However, because speech can only be regulated under certain exceptions to the First Amendment,³⁷² *Brandenburg* should not be read as defining a limited category of advocacy that is protected, but instead as defining a category of advocacy that is not protected.³⁷³ Therefore, even if *Brandenburg* does not recognize *Hit Man* as abstract advocacy, the First Amendment may, nonetheless, protect the manual.

Even if *Brandenburg* applies to speech that does not encourage societal change, it is uncertain, given its "imminence requirement," whether it would apply to written material. Speeches given to crowds can produce an immediate riot.³⁷⁴ Written material, by its very nature, cannot produce this kind of immediate reaction because reading takes time.³⁷⁵ Although the Supreme Court has not addressed *Brandenburg's* imminence requirement in the context of written speech, at least one Justice has recognized that "[w]ritten words are less apt to incite or provoke to mass action than spoken words, speech being the primitive and direct communication with the emotions."³⁷⁶ The Fifth Circuit in *Herceg v. Hustler Magazine, Inc.*³⁷⁷ opined that it was "inappropriate" to apply *Brandenburg* to incitement caused by written material because "[t]he root of incitement theory appears to have been

371. See, e.g., *id.* at 444-46 (discussing defendant's arrest during a Ku Klux Klan rally for saying that the Klan might need to take revenge if the government continued to suppress the white race); *Hess v. Indiana*, 414 U.S. 105, 106-07 (1973) (per curiam) (considering the propriety of defendant's arrest for saying "We'll take the fucking street later" or "We'll take the fucking street again" during an antiwar demonstration).

372. See *Turner Broadcasting Sys., Inc. v. FCC*, 512 U.S. 622, 641-42 (1994) (noting that "the First Amendment, subject only to narrow and well-understood exceptions, does not countenance governmental control over the content of messages expressed by private individuals" (citing *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382-83 (1992); *Texas v. Johnson*, 491 U.S. 397, 414 (1989))); *supra* note 213 (discussing the recognized categories of unprotected speech).

373. See *Rice*, 128 F.3d at 263-64 (discussing the difficulties in deciphering the meaning of the *Brandenburg* opinion).

374. See, e.g., *People v. Feiner*, 91 N.E.2d 316, 319-20 (N.Y. 1950) (observing that defendant's speech to a crowd on a sidewalk threatened "[a]n imminent danger of a breach of the peace, of a disturbance of public order, perhaps even of riot"), *aff'd*, 340 U.S. 315 (1951).

375. But see Theresa J. Pulley Radwan, *How Imminent is Imminent?: The Imminent Danger Test Applied to Murder Manuals*, 8 SETON HALL CONST. L.J. 47, 67 (1997) (suggesting that the one year time period between Perry's acquisition of the book and the murders could satisfy the "imminence" requirement because although the act of murder does not occur immediately, the unlawful activity of planning the murder could begin immediately after one begins reading the book).

376. *Kunz v. New York*, 340 U.S. 290, 307 (1951) (Jackson, J., dissenting).

377. 814 F.2d 1017 (5th Cir. 1987).

grounded in concern over crowd behavior.”³⁷⁸ The *Herceg* court quoted John Stuart Mill’s *On Liberty*: “An opinion that corn dealers are starvers of the poor, or that private property is robbery, ought to be unmolested when simply circulated through the press, but may justly incur punishment when delivered orally to an excited mob assembled before the house of a corn dealer.”³⁷⁹ Judge Jones, dissenting, agreed, asserting that “advocacy of inciteful ideas would . . . be differently regarded in a collection of speeches by Tom Paine than it is among a crowd of armed vigilantes who proceed to riot.”³⁸⁰

b. *Rice Could Foreshadow the Development of Intent-Based Requirements for Imposing Civil Liability on Recorded Speech.*—If Paladin’s “astonishing stipulations,” which the court found were made “in almost taunting defiance,” were unusual before,³⁸¹ they will be unheard of after this case. No rational publisher will invite another court to follow *Rice* by making similar stipulations. However, these stipulations were not essential to the court’s holding.³⁸² The court held that the trier of fact could have found the requisite liability based on the content and tone of the book itself, as well as from Paladin’s marketing strategy.³⁸³

The court strongly suggested that knowledge is sufficient intent for civil liability under Maryland’s aiding and abetting law.³⁸⁴ In a

378. *Id.* at 1023.

379. *Id.* (internal quotation marks omitted) (quoting JOHN STUART MILL, *ON LIBERTY* 67-68 (Corrin V. Shields ed., Prentice Hall 1956 (1859))).

380. *Id.* at 1030 (Jones, J., concurring and dissenting).

381. *Rice*, 128 F.3d at 265, 267.

382. *See id.* at 253 (finding that the trier of fact could conclude requisite intent without reference to the intent stipulation); *id.* at 256 (finding that stipulations are unnecessary to conclude that *Hit Man* is not the kind of advocacy protected by the First Amendment).

383. *See supra* notes 322-326 and accompanying text (discussing several bases upon which the jury could find the requisite intent to establish Paladin’s liability).

384. *See Rice*, 128 F.3d at 251 (quoting Judge Learned Hand as defining the standard for civil aiding and abetting as knowledge of the consequences of one’s actions). The concept of intent has been treated in some depth by the criminal law. Radwan, *supra* note 375, at 68. The Model Penal Code has articulated four levels of intent: purposefully, knowingly, recklessly, and negligently. MODEL PENAL CODE § 2.02 (1962). The Code ascribes different intents to different crimes. Radwan, *supra* note 375, at 68-69. “Purposeful” is the most specific level of intent. *Id.* An act that requires a result, e.g., aiding and abetting a crime, is done “purposely” when “it is [the actor’s] conscious object . . . to cause such a result.” MODEL PENAL CODE § 2.02(2)(a)(i). However, if the actor is merely “aware that it is practically certain that his conduct will cause such a result,” then the act is done “knowingly.” *Id.* § 2.02(2)(b)(ii).

The *Rice* court’s opinion also suggests that it will look to the publication rather than the publisher to determine the latter’s intent. It would be difficult to argue that Paladin’s corporate goal was to aid and abet the crime of murder. *See* Radwan, *supra* note 375, at 69 (“[I]t is a stretch to believe Paladin’s executives wanted more murders to take place.” (cit-

footnote, the court said that the Plaintiffs' aiding and abetting counts "require that Paladin have acted knowingly or intentionally."³⁸⁵ However, the Fourth Circuit suggested that a heightened First Amendment standard might apply when speech is the conduit for the alleged aiding and abetting.³⁸⁶ The court did not explicitly decide the level of intent required for liability for civil aiding and abetting with regard to a how-to book for activity that is criminal per se because it concluded that, based on Paladin's stipulations and the facts of the case, a jury could find "that Paladin acted with a kind and degree of intent[] that would satisfy any heightened standard that might be required by the First Amendment prerequisite to the imposition of liability for aiding and abetting through speech conduct."³⁸⁷ However, it distinguished books that instruct on activity that is sometimes criminal and sometimes not, depending on the context, as well as other types of books, by assuming that liability could not be imposed on a finding of mere foreseeability or knowledge that the information therein might be misused.³⁸⁸ In doing so, the Fourth Circuit has opened the door for a future and more explicit holding that knowledge that an instruction manual could be used to commit crimes is sufficient if the book teaches the techniques of activities that are criminal per se, as does *Hit Man*.³⁸⁹

ing *Rice v. Paladin Enters., Inc.*, 940 F. Supp. 836, 847 (D. Md. 1996) (mem.), *rev'd*, 128 F.3d 233 (4th Cir. 1997), *cert. denied*, 118 S. Ct. 1515 (1998))). Like most commercial publishers, Paladin's purpose was almost certainly to generate profits by selling as many books as possible, not to cause more murders to occur. *Id.*; *see also Rice*, 940 F. Supp. at 840 ("All parties agree that Paladin's marketing strategy is intended to maximize sales to the public . . ."). In light of this obvious corporate goal and the Fourth Circuit's holding that the jury could infer intent in large part from the content of the book itself, it appears that the court is more concerned with what might be called the "artistic purpose" of the book than with its obvious "corporate purpose." *See supra* text accompanying note 383 (discussing the court's conclusion that the jury could infer the requisite intent from the content of *Hit Man*). The court essentially imputed this "artistic purpose" to the corporation, disregarding Paladin's profit motive, and concluded that intent should be determined with reference to the book, not to the corporation itself.

385. *Rice*, 128 F.3d at 248 n.4.

386. *Id.* at 247 (noting that "the First Amendment may, at least in certain circumstances, superimpose upon the speech-act doctrine a heightened intent requirement in order that preeminent values underlying that constitutional provision not be imperiled" (citations omitted)).

387. *Id.* at 248 (footnote omitted).

388. *See id.* at 265-66.

389. A holding that knowledge is sufficient would find support in *United States v. Featherston*, 461 F.2d 1119, 1122 (5th Cir. 1972), in which the Fifth Circuit rejected a First Amendment challenge to a statute that made it a crime to teach or demonstrate the making of an explosive device after construing the statute to require "intent or knowledge that the information disseminated would be used in the furtherance of a civil disorder." *See also Rice*, 128

c. *Rice Endangers Other Forms of Recorded Speech*.—Despite the court's protestations to the contrary,³⁹⁰ there is a danger that *Rice* will one day be used as precedent to hold publishers of other forms of literature liable for "copy-cat" crimes. The court's suggestion that knowledge might be sufficient intent for books that instruct on activity criminal per se,³⁹¹ and its holding that this intent can be inferred from the content of the book itself, are troubling because there is no clear distinction between such an instructional manual and other types of books. Various literary genres are similar to *Hit Man*.³⁹² Whatever wisdom they bring to the fact-finding process, judges and juries are not professors of literature.³⁹³ *Hit Man* may be relatively easy to identify as a murder manual, rather than as another form of literature, but there will be books that could fit into either category. Permitting juries to decide whether a book is protected literature or an unprotected murder manual will have a chilling effect on the publication of certain books.

One genre that could suffer is satire. One of the greatest examples of literary satire is Jonathan Swift's *A Modest Proposal*,³⁹⁴ in which the writer proposes that the poor tenants of Ireland sell their children to wealthy landlords as food.³⁹⁵ Swift presents his proposal as a mutually beneficial solution to the overpopulation and poverty in Ireland:

A child will make two dishes at an entertainment for friends;
and when the family dines alone, the fore or hindquarter will

F.3d at 247 (citing *Featherston* when discussing the possible imposition of a heightened intent requirement in certain situations).

390. See *supra* note 342 and accompanying text (noting the *Rice* court's assertions that the holding in the present case will not necessarily have the far-reaching impact feared by the media amici).

391. See *supra* notes 384-389 and accompanying text (asserting that the court's opinion has opened the door for a future holding that a publisher's knowledge that an instruction manual on criminal per se activity will be used by criminals satisfies any heightened intent requirement imposed by the First Amendment).

392. See, e.g., *infra* notes 394-401, 403-405, 406-409 and accompanying text (discussing satire, murder mysteries and horror fiction, and informational texts for writers, respectively).

393. See *A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Attorney General of Massachusetts*, 383 U.S. 413, 427 (1966) (Douglas, J., concurring) ("We are judges, not literary experts or historians or philosophers. We are not competent to render an independent judgment as to the worth of this or any other book, except in our capacity as private citizens.").

394. JONATHAN SWIFT, *A MODEST PROPOSAL FOR PREVENTING THE CHILDREN OF POOR PEOPLE IN IRELAND FROM BEING A BURDEN TO THEIR PARENTS OR COUNTRY, AND FOR MAKING THEM BENEFICIAL TO THE PUBLIC* (1729), reprinted in 1 *THE NORTON ANTHOLOGY OF ENGLISH LITERATURE*, at 2181 (M.H. Abrams ed., 6th ed. 1993).

395. See Brief of Amici Curiae in Support of Affirmance at 4-5, *Rice* (No. 96-2412) (discussing Swift's *A Modest Proposal*).

make a reasonable dish, and seasoned with a little pepper or salt will be very good boiled on the fourth day, especially in winter.

. . . .

Those who are more thrifty (as I must confess the times require) may flay the carcass; the skin of which artificially dressed will make admirable gloves for ladies, and summer boots for fine gentlemen.

As to our city of Dublin, . . . butchers we may be assured will not be wanting; although I rather recommend buying the children alive, and dressing them hot from the knife as we do roasting pigs.³⁹⁶

Nowhere in the pamphlet does Swift ever overtly say that he is not serious about his proposal.³⁹⁷ Yet commentators recognize this piece as a superb example of satirical irony.³⁹⁸ The piece, according to one commentator, “expresses in Swift’s most controlled style his pity for the oppressed, ignorant, populous, and hungry Catholic peasants of Ireland and his anger at the rapacious English absentee landlords, who were bleeding the country white with the silent approbation of Parliament, ministers, and the crown.”³⁹⁹

This kind of political commentary is central to the purpose of the First Amendment.⁴⁰⁰ However, the political purpose of satire is never obvious if it is done well,⁴⁰¹ and may be difficult for the most astute readers to spot if it is done badly. Permitting judges and juries to decide whether a work like *Hit Man* or *A Modest Proposal* is a subtle criticism of the status quo or an effort to aid and abet criminal activity threatens to silence the political criticism expressed through satire. This threat is made worse by the fact that judges and juries often rep-

396. SWIFT, *supra* note 394, at 2183 (footnote omitted).

397. *See id.* at 2181 n.1 (observing that Swift’s “rigorous logic deduces ghastly arguments from a shocking premise so quietly assumed that readers assent before they are aware of what that assent implies”).

398. *See, e.g., id.* (asserting that “*A Modest Proposal* is an example of Swift’s favorite satiric devices used with superb effect”).

399. *Id.*

400. *See* *Boos v. Barry*, 485 U.S. 312, 318 (1988) (plurality opinion) (recognizing that “the First Amendment reflects a ‘profound national commitment’ to the principle that ‘debate on public issues should be unlimited, robust, and wide-open,’” and noting that the Court has “consistently commented on the central importance of protecting speech on public issues” (quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964))).

401. *See* SWIFT, *supra* note 394, at 2181 n.1 (describing *A Modest Proposal* as “rigorous[ly] logic[al]”).

resent the power structures and majoritarian views that are criticized by good satire.⁴⁰²

The line distinguishing “murder manuals” and other writing will be even more difficult to draw after writers and publishers of these manuals inevitably alter them to resemble narratives or instruction books for writers in an effort to escape liability under the *Rice* standard. Such works already exist. One example, cited by the media *amici* urging affirmance of the district court holding, is Thomas Harris’s bestselling suspense novel, *Silence of the Lambs*,⁴⁰³ in which a character named Jame Gumb kills women and flays them to make a female body suit out of their skin.⁴⁰⁴ The media *amici* quote the following passage:

Watching Catherine, playing the infrared flashlight up and down her, Mr. Gumb prepares himself for the very real problems ahead.

The human skin is fiendishly difficult to deal with if your standards are as high as Mr. Gumb’s. There are fundamental structural decisions to make, and the first one is where to put the zipper.

He moves the beam down Catherine’s back. Normally he would put the closure in the back, but then how could he don it alone? It won’t be the sort of thing he can ask someone to help him with, exciting as that prospect might be To split the center front would be sacrilege—he puts that right out of his mind.

. . . .

Experience has taught him to wait from four days to a week before harvesting the hide. Sudden weight loss makes the hide looser and easier to remove. In addition, starvation takes much of his subjects’ strength and makes them more manageable. More docile. A stuporous resignation comes over some of them. At the same time, it’s necessary to pro-

402. See *infra* note 413 (citing cases that raise concerns about the danger of majoritarian influences and a jury’s uncontrolled discretion); cf. *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 638 (1943) (“The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts.”).

403. THOMAS HARRIS, *SILENCE OF THE LAMBS* (1988).

404. See Brief of Amici Curiae in Support of Affirmance at 7-8, *Rice* (No. 96-2412 (discussing the premise and prose of *Silence of the Lambs*)).

vide a few rations to prevent despair and destructive tantrums that might damage the skin.⁴⁰⁵

If someone actually wanted to accomplish this depraved task, this book contains details about how to do it.

A second kind of book that will be difficult to distinguish from *Hit Man* is the informational book for writers. Writers who write stories about crime are informed about the habits and methods of criminals by books like *Modus Operandi: A Writer's Guide to How Criminals Work*,⁴⁰⁶ *Armed and Dangerous: A Writer's Guide to Weapons*,⁴⁰⁷ and *Cause of Death: A Writer's Guide to Death, Murder & Forensic Medicine*.⁴⁰⁸ For instance, the authors of *Modus Operandi* advise the readers about tricks employed by burglars:

[L]et's give you an inside tip on what burglars do to give them more time to escape when you arrive home a little earlier than planned. They place small pieces of broken toothpicks in the keyhole after they enter. The reason for this is your key will not fit into the lock, so you cannot enter your home. The noise that you make trying to open your door will alert our burglar that you are home.⁴⁰⁹

This clearly would be very helpful to writers, who are not necessarily familiar with the *modus operandi* of criminals. Unfortunately, it would also be helpful to criminals.

One can imagine a day when the new hole that *Rice* made in the fabric of the First Amendment is stretched to permit juries in tort cases to scrutinize books to determine whether they are murder manuals disguised as works of fiction or true crime nonfiction.⁴¹⁰ The

405. *Id.* at 7-8 (omission in original) (internal quotation marks omitted) (quoting HARRIS, *supra* note 403, at 205-06). This description of Jame Gumb's demented work occupies only a few pages of the novel. However, it illustrates how difficult it could be for triers of fact to distinguish between a narrative and a thinly disguised instructional manual.

406. MAURO V. CORVASCE & JOSEPH R. PAGLINO, *MODUS OPERANDI: A WRITER'S GUIDE TO HOW CRIMINALS WORK* (1995), *cited in* Brief of Amici Curiae in Support of Affirmance at 24, *Rice*, (No. 96-2412).

407. MICHAEL NEWTON, *ARMED AND DANGEROUS: A WRITER'S GUIDE TO WEAPONS* (1990).

408. KEITH D. WILSON, *CAUSE OF DEATH: A WRITER'S GUIDE TO DEATH, MURDER & FORENSIC MEDICINE* (1992), *cited in* Brief of Amici Curiae in Support of Affirmance at 24, *Rice* (No. 96-2412).

409. CORVASCE & PAGLINO, *supra* note 406, at 165, *quoted in* Brief of Amici Curiae in Support of Affirmance at 24, *Rice* (No. 96-2412).

410. The media *amici* cite excerpts from works by well-known writers like Jonathan Swift, Thomas Harris, and even the Bible and the Koran, which they contend would be vulnerable under the Fourth Circuit's *Rice* decision. Brief of Amici Curiae in Support of Affirmance at 4-5, 7-8, 8-9 n.10, *Rice* (No. 96-2412). Of course, these authors are viewed as belonging to certain genres that have long been protected by the First Amendment, and their works are today classified as part of those genres. A jury would be unlikely to find

Fourth Circuit decided that the jury could disregard the Paladin's disclaimer, "For academic study only!"⁴¹¹ Unless the holding in *Rice* is carefully restricted to cases involving similar stipulations or overruled, a court may one day broaden the application of *Rice* and hold that a jury can disregard the fact that a book identifies itself as an informational aid for crime fiction writers, or as a narrative.

This situation is worsened by the court's apparent willingness to allow juries to draw their own conclusions about the nature of a book and the intent of its author from the contents of the book itself.⁴¹² Juries may be unlikely to find a criminal nature or intent in well-known works. However, in light of the absence of clear distinctions between murder manuals and other kinds of writing, triers of fact may quietly opt to impose liability to punish particularly offensive lesser-known works.⁴¹³ Importantly, it is this kind of fringe expression for which First Amendment protection is most needed.⁴¹⁴

The court's decision raises another troubling question: Should the reading material available to the law-abiding public be limited by the propensity of a criminal to use a book to commit a crime? In his concurring opinion in *A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Attorney General of Massachusetts*,⁴¹⁵ Justice Douglas considered whether the concern that pornography might lead to anti-social sexual conduct would justify its censorship:

[J]udges cannot gear the literary diet of an entire nation to whatever tepid stuff is incapable of triggering the most demented mind. The First Amendment demands more than a

that Stephen King's latest book was nothing more than a thinly veiled murder manual, because his reputation for horror fiction is well known. The real danger is to lesser known authors who write a book that is used in a "copy-cat" crime. Under *Rice*, courts might leave to the jury the question whether a book is a "legitimate" work or a thinly disguised murder manual like *Hit Man*.

411. *Rice*, 128 F.3d at 254 (quoting 26 PALADIN PRESS CATALOG, *supra* note 325, at 41).

412. See *supra* notes 322-326 and accompanying text (discussing the various bases upon which the court found a jury could find intent sufficient to hold Paladin civilly liable).

413. See *Herceg v. Hustler Magazine, Inc.*, 814 F.2d 1017, 1024 (5th Cir. 1987) (concluding that differentiating between different categories of speech "would not only be hopelessly complicated but would raise substantial concern that the worthiness of speech might be judged by majoritarian notions of political and social propriety and morality"); cf. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 349 (1974) (limiting certain defamation awards to actual damages based on the recognition that "[t]he largely uncontrolled discretion of juries to award damages where there is no loss unnecessarily compounds the potential of any system of liability for defamatory falsehood to inhibit the vigorous exercise of First Amendment freedoms").

414. Cf. *supra* notes 402, 413 and accompanying text (noting that the First Amendment exists to protect freedom of speech from being controlled by majoritarian notions of propriety and morality).

415. 383 U.S. 413 (1966).

horrible example or two of the perpetrator of a crime of sexual violence, in whose pocket is found a pornographic book, before it allows the Nation to be saddled with a regime of censorship.⁴¹⁶

Considering whether reasonable foreseeability of harm could support a negligence action based on speech by the defendant, one commentator argued:

Absurd things happen, but to hold a person responsible for another person's absurdity is arguably the most absurd position of all. It could easily make a mockery of First Amendment freedom of expression⁴¹⁷

The purveyor of a text written with the sole purpose of aiding and abetting criminals is arguably more culpable than an entity that can merely foresee that its speech might help criminals, but as previously noted, it is difficult to distinguish between the two.⁴¹⁸

Finally, the court's decision probably will not reduce the number of people who become professional killers or significantly reduce their educational options. Killers can learn about killing from mystery novels and horror fiction,⁴¹⁹ informational books for writers,⁴²⁰ true crime stories and news accounts,⁴²¹ movies,⁴²² and even judicial opinions.⁴²³ Instead of committing crimes by following the instructions in

416. *Id.* at 432 (Douglas, J., concurring).

417. Sandra Davidson, *Blood Money: When Media Expose Others to Risk of Bodily Harm*, 19 HASTINGS COMM. & ENT. L.J. 225, 237 (1997).

418. *See* text accompanying *supra* notes 392-409 (noting the difficulty in distinguishing between various literary genres).

419. *See* text accompanying *supra* notes 403-405.

420. *See* text accompanying *supra* notes 406-409 (discussing informational books for writers).

421. *See, e.g.,* THE NEW YORK REVIEW OF BOOKS, Aug. 24, 1967, at 1 (featuring on front page a diagram showing how to make the homemade bomb known as a molotov cocktail), *cited in* Brief of Amici Curiae in Support of Affirmance at 26, *Rice* (No. 96-2412).

422. The *Media Amici* identified several movies that contain details about how to commit crimes, including *The Mechanic* (United Artists) (1972) (depicting a hit man training a protégé on the planning and execution of contract kills); *The Godfather* (Paramount 1972) (showing how to avoid leaving fingerprints and how to leave the scene of a public "hit"); *On Deadly Ground* (Warner Bros. 1990) (showing how to make a silencer out of household objects); and *The Exterminator* (Interstar/AE 1980) (showing how to fill hollowpoint bullets with poison). Brief of Amici Curiae in Support of Affirmance at 26, *Rice* (No. 96-2412).

423. The Horror Writers Association's *amicus* brief cites *United States v. Peltier*, 585 F.2d 314, 318-19 (8th Cir. 1978) (describing murders of FBI agents) as one example. *Amicus* Brief of Horror Writers Ass'n at 8, *Rice* (No. 96-2412). An even better example is the Fourth Circuit's *Rice* opinion itself, which includes several pages of excerpts from *Hit Man*. *Rice*, 128 F.3d at 235-39, 257-62. For that matter, even this Note contains information that could be dangerous if misused.

an instructional manual, criminals can use information gleaned from the foregoing sources.⁴²⁴

5. *Conclusion.*—The district court observed that “this is a novel case with unprecedented future implications.”⁴²⁵ The Fourth Circuit took pains to limit its holding strictly to books that teach activity that is criminal per se in exacting detail in a way that relentlessly encourages the reader in the commission of the crime.⁴²⁶ Nevertheless, the guidelines that the court provided for the finder of fact fail to distinguish clearly between “murder manuals” and books with noncriminal purposes. Because this distinction is so difficult to make, courts would better serve the values underlying this nation’s commitment to freedom of speech by refusing to impose liability for civil aiding and abetting against book publishers. At the very least, courts should respect the Fourth Circuit’s admonition that its holding in *Rice* should rarely if ever be used to impose liability on publishers.⁴²⁷

BRIAN SACCENTI

424. In fact, the author of *Hit Man* realized this and recommended fictional mystery or murder stories as places to discover “ingenious new methods of terrorizing, victimizing, or exterminating.” *HIT MAN*, *supra* note 190, at 10. The author explains:

[L]et’s not forget reading for entertainment. With the right attitude and an open mind, almost any good mystery or murder story can provide some ingenious new methods of terrorizing, victimizing, or exterminating. Sometimes a new poison will be introduced, or perhaps a new method for induction. Sometimes the warped imagination of a fiction writer will point out an obvious but somehow never before realized method of pacification or body disposal. So don’t bypass those fictional characters. Chuckle through the trench coats and warped personalities but test out any new theories you come across.

Id.

425. *Rice v. Paladin Enters., Inc.*, 940 F. Supp. 836, 848 (D. Md. 1996) (mem.), *rev’d*, 128 F.3d 233 (4th Cir. 1997), *cert. denied*, 118 S. Ct. 1515 (1998).

426. See *supra* notes 340-364 and accompanying text.

427. The Fourth Circuit will likely have the opportunity to revisit its holding. Three books that instruct on how to make bombs are *The Poor Man’s James Bond*, *The Anarchist Cookbook*, and *Fighting in the Streets*. See *United States v. Bullis*, No. 96-4354, 1998 WL 171328, at *3 (4th Cir.) (per curiam), *cert. denied*, 119 S. Ct. 220 (1998). These books were found at the home of a man who was arrested for mailing pipe bombs. *Id.* *Rice* may have been the first case of its kind, but it probably will not be the last.

II. EMPLOYMENT LAW

A. *Inviting Employers to Retaliate Against Employees Who Assert Their Rights Under Title VII*

In *Munday v. Waste Management of North America, Inc.*,¹ the United States Court of Appeals for the Fourth Circuit held that an employer's conduct of "instruct[ing] [other] employees to ignore and spy on" their coworker after she filed an employment discrimination charge did not, in itself, constitute actionable retaliation under section 704(a) of Title VII.² The court reasoned that because no tangible employment-related harm directly flowed from the employer's conduct, it did not satisfy the element of "adverse employment action" required for retaliation under Title VII.³ In addition, the *Munday* court held that while a constructive discharge constitutes an adverse employment action, the unpleasant working environment that resulted from the employer's conduct did not rise to the level of intolerable work conditions⁴ necessary for a constructive discharge claim under Title VII.⁵ In so ruling, the Fourth Circuit in *Munday* set limits on the scope of actionable employer conduct under 704(a) and restricted constructive discharge claims under Title VII. The *Munday* decision reflects the Fourth Circuit's view that section 704(a) was not intended to function as Title VII's broad retaliation proscription. Moreover, the *Munday* ruling thus permits employers to engage in some "retaliation" against employees who assert their rights under Title VII, leaving such employees without recourse.

1. *The Case.*—On December 7, 1992, Dawn Munday resigned from her job as a truck driver for Waste Management of Maryland, Inc. (Waste Management).⁶ For Munday, this resignation was the culmination of several years of difficulties with her employer, difficulties which she believed were based on gender discrimination.⁷ Munday

1. 126 F.3d 239 (4th Cir. 1997), *cert. denied*, 118 S. Ct. 1053 (1998).

2. *Id.* at 243.

3. *Id.*

4. *Id.* at 244 (internal quotation marks omitted) (quoting *Bristow v. Daily Press, Inc.*, 770 F.2d 1251, 1255 (4th Cir. 1985)).

5. *Id.* at 243-44.

6. *Id.* at 242 (citing *Munday v. Waste Management of N. Am., Inc.*, 858 F. Supp. 1364, 1371 (D. Md. 1994), *aff'd in part, rev'd in part*, 126 F.3d 239 (4th Cir. 1997)).

7. *See id.* at 244 (noting the district court's finding that "Miss Munday 'wrongly viewed [the activity of which she complained] as based on sex discrimination and sexual harassment'" (quoting *Munday*, 858 F. Supp. at 1375)).

alleged that for approximately one year after she was hired in 1988,⁸ she was subjected to numerous instances of sexual harassment⁹ that ultimately compelled her to “walk off the job” on May 30, 1989.¹⁰ Waste Management fired Munday on that same day after concluding that her actions constituted insubordination.¹¹ Munday subsequently filed a claim of sexual harassment and sex discrimination with the Howard County (Maryland) Office of Human Rights, which, upon investigation, issued a reasonable-cause letter in June 1990.¹² In April 1991, after the hearing had commenced, the parties entered into a settlement agreement, which provided for, among other things, Munday’s reinstatement at Waste Management and a promise on the part of Waste Management not to retaliate against Munday for filing her discrimination complaint.¹³

Notwithstanding the settlement agreement, Munday’s difficulties with Waste Management, particularly with the company’s general manager, Robert Bohager, persisted after her reinstatement.¹⁴ Prior

8. This was actually the second time Munday was hired by Waste Management. She was initially hired in December 1986 to work in the Maryland facility, but was transferred to the Greater Washington facility in May 1987 where she worked for six months before leaving to work briefly for a competitor of Waste Management. She was subsequently rehired in August 1988 to work at the Maryland facility. *See Munday*, 858 F. Supp. at 1367.

9. *See id.* at 1367-68. Specifically, Munday alleged that the following acts of sexual harassment occurred:

First, . . . a dispatcher . . . who kept a key to the [only available] women’s bathroom[] regularly denied Munday access to the bathroom . . . [and] repeatedly made comments to her such as, ‘How bad do you have to go?’, and ‘Can’t you hold it in?’. Second, she received less pay than her male co-workers. Third, when she asked to have extra work assigned to her, . . . her immediate supervisor[] remarked that she had ‘one strike against her because she was a woman’ and that she should not be in her job ‘taking food out of the mouths of men.’ Fourth, when she was assigned additional work, more often than not, her pay was not adjusted to compensate her for the added undertaking until she complained of the same. Fifth, her paperwork, including route and schedule, was constantly placed in the ‘driver’s lounge,’ which was in actuality the men’s changing area and bathroom. Sixth, drivers and dispatchers made comments and jokes over the two-way radio installed in every truck, including comments that Munday was ‘on the rag’ and ‘under sexual pressure.’

Id.

10. *Id.* at 1368 (noting that Munday decided to “walk off the job” after arriving for work and discovering that her assigned truck was not in “proper operating condition”).

11. *Id.* (noting that at the time Munday was fired, Waste Management informed her that as a matter of company policy, “termination was their only recourse for an employee who walked off the job”).

12. *Id.* at 1368-69.

13. *Id.* at 1369. The settlement agreement provided that “‘there shall be no discrimination or retaliation of any kind’ against any person for engaging in protected activity.” *Munday*, 126 F.3d at 245 (quoting paragraph 4 of the settlement agreement).

14. *See Munday*, 858 F. Supp. at 1369-71.

to Munday's return to work, Bohager allegedly instructed Waste Management's employees "not to socialize with Munday and to avoid her as much as possible,"¹⁵ and "to report back to Bohager anything she said to other employees."¹⁶ In addition, Bohager allegedly refused to address any of Munday's complaints about the work environment.¹⁷ On July 26, 1991, the tension between Munday and Bohager appeared to be at its peak.¹⁸ According to Munday, Bohager "exploded" at her when they finally met to discuss her complaints.¹⁹ Following that incident, due to several periods of disability leave, Munday worked at Waste Management only "intermittently."²⁰ She began working for another company in October 1992 and ultimately resigned from Waste Management in early December.²¹

Munday brought suit against Waste Management in the United States District Court for Maryland, alleging that she was retaliated against because she filed sex discrimination charges and because of the resulting settlement agreement, thus violating her rights as protected by Title VII of the Civil Rights Act of 1964.²² Munday contended, specifically, that Waste Management constructively discharged her as a result of their conduct.²³ Munday further sued Waste Management for breach of contract for retaliating against her in violation of their settlement agreement.²⁴ The district court held that Bohager's conduct after Munday's reinstatement satisfied the requirement of "adverse employment action" necessary to establish a *prima facie* retaliation claim under Title VII.²⁵ The court specifically held that this retaliatory conduct rendered Munday's work atmosphere objectively intolerable and, thus, constituted a constructive dis-

15. *Munday*, 126 F.3d at 241 (citing *Munday*, 858 F. Supp. at 1369).

16. *Id.* (citing *Munday*, 858 F. Supp. at 1370).

17. *Id.*

18. *Id.*

19. *Id.* Bohager shouted at Munday because "he had heard a rumor that she planned to sue the company again." *Munday*, 858 F. Supp. at 1370. According to Munday, when she denied this accusation and attempted to discuss her complaints, Bohager responded that he "didn't give a shit" about her problems. *Id.*

20. *Munday*, 858 F. Supp. at 1370-71.

21. *Id.* at 1371.

22. *Id.* at 1374. Munday also brought suit against Waste Management for sex discrimination and sexual harassment in violation of Title VII, claims that the district did not find actionable. *Id.* at 1373-74. This note addresses only her retaliation and constructive discharge claims under Title VII.

23. *Id.* at 1375-76.

24. *Id.* at 1376.

25. *Id.* at 1374-76.

charge.²⁶ Under the provisions of Title VII, Munday was awarded back pay, compensatory damages for psychological harm, and punitive damages.²⁷ Finally, the district court held that Waste Management breached paragraph four of the settlement agreement, which provided that it would not retaliate against Munday for filing a charge of discrimination with the Howard County Office of Human Rights.²⁸ However, because her contractual damages were identical to her damages under Title VII, Munday's recovery was limited to damages available under Title VII.²⁹ Waste Management appealed to the Fourth

26. *Id.* at 1375-76. The *Munday* court determined that the essence of the district court's decision was that Munday's constructive discharge was an adverse employment action in violation of section 704(a) of Title VII:

[Although] [t]he district court did not explicitly find any causal link between the protected activity of Miss Munday and the constructive discharge, . . . because the district court relied upon substantially the identical factual bases in determining that [she] had been constructively discharged as it had relied upon in determining that [she] had been unlawfully retaliated against, the gist of the district court's conclusion regarding the Title VII retaliation claim is that [she] was subjected to retaliatory constructive discharge because of her pursuit of a complaint before the Office of Human Rights.

Munday, 126 F.3d at 243.

27. *Munday*, 858 F. Supp. at 1377-79.

28. *Id.* at 1376.

29. *Id.* at 1381. The district court found that Munday would not be entitled to compensatory or punitive damages for retaliatory conduct predating November 21, 1991, which is the effective date of the Civil Rights Act of 1991. *Id.* at 1376. Prior to the 1991 Act, damages for prevailing Title VII plaintiffs were traditionally limited to "make-whole equitable relief," including reinstatement and back pay. Douglas E. Ray, *Title VII Retaliation Cases: Creating a New Protected Class*, 58 U. PITT. L. REV. 405, 429 (1997) ("[T]he traditional Title VII remedies [were] make-whole equitable relief, including back pay and attorneys fees . . ."); see 42 U.S.C. § 2000e-5(g) (1994) (providing for reinstatement and back pay as possible remedies for prevailing Title VII plaintiffs); Melissa A. Essary & Terence D. Friedman, *Retaliation Claims under Title VII, the ADEA, and the ADA: Untouchable Employees, Uncertain Employers, Unresolved Courts*, 63 MO. L. REV. 115, 150 (1998) (noting that "[t]raditionally, damages under Title VII . . . were limited to equitable relief").

Congress found that additional remedies and legislation were needed to deter and protect against unlawful harassment and intentional discrimination in the workplace and added section 1981a in 1991. See 42 U.S.C. § 1981 note (1994) (Congressional Findings) (concluding that "additional remedies under Federal law are needed to deter unlawful harassment and intentional discrimination in the workplace . . . [and] legislation is necessary to provide additional protections against unlawful discrimination in employment"). Section 1981a amended the Act so that prevailing Title VII plaintiffs may now recover compensatory damages and up to \$300,000 in punitive damages, depending on the size of the employer. See 42 U.S.C. § 1981a(b)(3). The 1991 Act provides compensatory damages for future pecuniary losses; nonpecuniary losses, including "emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life," etc.; and punitive damages—subject to the following limitations as to amount: \$50,000 for respondents employing "more than 14 and fewer than 101 employees"; \$100,000 for respondents employing "more than 100 and fewer than 201 employees"; \$200,000 for respondents employing "more than 200 and fewer than 501 employees"; and \$300,000 for respondents employing "more than 500 employees." *Id.*

Circuit and challenged the district court's findings of retaliation and constructive discharge, breach of settlement agreement, and, further, whether the district court's damages award was proper.³⁰

2. *Legal Background.*—

a. Title VII's Anti-Retaliation Provision.—Congress enacted Title VII of the Civil Rights Act of 1964 (Title VII) in order to protect employees from discrimination in employment.³¹ Section 703(a) of Title VII prohibits employers from discriminating based on sex, race, national origin, and religion, and defines discrimination with respect to "compensation, terms, conditions, or privileges of employment."³²

In order to further Title VII's purpose of preventing discrimination in employment, Congress included section 704(a), which prohibits employers from discriminating against employees who exercise their right to protest against discriminatory workplace practices, file charges against employers engaging in the discriminatory practices prohibited by section 703(a), or otherwise participate in activities protected by Title VII.³³ In essence, section 704(a) is an anti-retaliation provision that protects employees who attempt to assert their rights, or aid others asserting their rights, under Title VII.³⁴

30. *Munday*, 126 F.3d at 242-45.

31. See *Griggs v. Duke Power Co.*, 401 U.S. 424, 429-30 (1971) (stating that the purpose of Title VII is to "achieve equality of employment opportunities and remove barriers that have operated in the past").

32. 42 U.S.C. § 2000e-2(a)(1). Section 703(a) of Title VII provides:

It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

Id. § 2000e-2(a).

33. 42 U.S.C. § 2000e-3(a) (1994). Section 704(a) provides in pertinent part:

It shall be an unlawful employment practice for an employer to discriminate against any of his employees . . . because he has opposed any practice made an unlawful employment practice by [Title VII], or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under [Title VII].

Id.

34. See *Essary & Friedman*, *supra* note 29, at 118 (noting that "Congress included [section 704(a)] . . . in order to enable employees to engage in . . . activities [protected by Title VII] without fear of retaliation by their employers."); *Ray*, *supra* note 29, at 409-13 (describing how Title VII's anti-retaliation provision ensures the effectiveness of Title VII employment discrimination prohibitions).

In the Fourth Circuit, as well as most other circuits, to establish a *prima facie* case of retaliation under Title VII, a plaintiff must satisfy three elements:³⁵ “(1) she engaged in protected activity; (2) her employer took adverse employment action against her; and (3) a causal connection exists between the protected activity and the adverse action.”³⁶ Once a plaintiff has satisfied the three elements, the employer may rebut the *prima facie* case by “producing a legitimate nondiscriminatory reason for the [second element of] adverse employment action.”³⁷

Under Title VII, a retaliation plaintiff establishes the first element of a *prima facie* case, which requires a protected activity, if she alleges either that she participated in a protected activity or opposed an employment practice made unlawful by Title VII.³⁸ The third element, which requires a causal connection between the retaliatory conduct and the protected activity, is satisfied in the Fourth Circuit if the plaintiff alleges, or it can be inferred, that the retaliatory conduct was motivated by the protected activity.³⁹ Once an employer rebuts the *prima facie* case, however, by presenting a legitimate nondiscriminatory reason for the conduct, the employee must show that the retaliation

35. See Essary & Friedman, *supra* note 29, at 120 & n.12 (stating that the three-element approach to retaliation is modified slightly in some circuits that include an additional element “requiring . . . an employer [to] have knowledge of the employee’s protected activity[,] . . . [while] [t]hose courts using only three elements subsume the fourth element of knowledge into the third element of causation.”); see also *Harrison v. Metropolitan Gov’t*, 80 F.3d 1107, 1118 (6th Cir. 1996) (employing the four-element approach to retaliation); *Ross v. Communications Satellite Corp.*, 759 F.2d 355, 365 & n.9 (4th Cir. 1985) (utilizing the three-element retaliation standard and noting that employer’s knowledge of employee’s protected activity “is not really a distinct element, . . . but is necessarily subsumed in the requirement of a causal connection”); *Cohen v. Fred Meyer, Inc.*, 686 F.2d 793, 796 (9th Cir. 1982) (utilizing the three-element retaliation standard that addresses employer’s knowledge of employee’s protected activity in the causation element).

36. *Carter v. Ball*, 33 F.3d 450, 458 (4th Cir. 1994); see *Gunnell v. Utah Valley State College*, 153 F.3d 1253, 1262-63 (10th Cir. 1998) (articulating the three-element standard for establishing a *prima facie* Title VII retaliation claim); *Knox v. Indiana*, 93 F.3d 1327, 1333-34 (7th Cir. 1996) (same); *Passer v. American Chem. Soc’y*, 935 F.2d 322, 331 (D.C. Cir. 1991) (same); *Cohen*, 686 F.2d at 796 (same); but see *supra* note 35 (describing a four-element approach to retaliation under Title VII employed by some courts).

37. *Ross*, 759 F.2d at 365; see *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1972) (establishing the burden-shifting scheme applied in Title VII retaliation cases). One scholar notes that the “overwhelming majority of courts rely on *McDonnell Douglas* in analyzing retaliation claims.” Essary & Friedman, *supra* note 29, at 120.

38. 42 U.S.C. § 2000e-3(a) (1994); see *supra* note 36 and accompanying text; see also Essary & Friedman, *supra* note 29, at 121-32 (providing a detailed overview of the broad range of scenarios in which courts find a protected activity).

39. See, e.g., *Williams v. Cerberonics, Inc.*, 871 F.2d 452, 457 (4th Cir. 1989) (establishing causality merely by showing that alleged retaliatory action followed protected activity).

would not have occurred “but for” the protected activity.⁴⁰ By and large, the element of retaliation that generates the widest debate among the courts, is what constitutes an “adverse employment action.”⁴¹

b. Adverse Employment Action: The Fourth Circuit View of Actionable Retaliation.—Among the circuits, courts hold three views of adverse employment action.⁴² Courts that take the narrowest view attempt to articulate a predictable, bright-line rule requiring “ultimate employment decisions, such as hiring and firing.”⁴³ Other courts have taken a still narrow, but less stringent approach and hold that actionable employer conduct must impair the employee’s current or future employment opportunities.⁴⁴ Both of these views, however, require a showing that the plaintiff experienced tangible employment-related

40. *Ross*, 759 F.2d at 365-66 (determining that the test for causation in the Fourth Circuit is the “but for” standard).

41. *Essary & Friedman*, *supra* note 29, at 117, 132-42 (asserting that “there is a clear split [about adverse employment action] in the nation’s circuits” and providing an overview of the various approaches taken by the courts).

42. *See* *Essary & Friedman*, *supra* note 29, at 133-34.

43. *Id.* at 134-37 (internal quotation marks omitted); *see, e.g., Mattern v. Eastman Kodak Co.*, 104 F.3d 702, 707-08 (5th Cir.), *cert. denied*, 118 S. Ct. 336 (1997) (holding that threatening an employee with termination after she filed a sexual harassment claim and failing to furnish her with necessary work tools did not constitute adverse employment action); *Hopkins v. Baltimore Gas & Elec. Co.*, 77 F.3d 745, 754-55 (4th Cir. 1996) (holding in a sexual harassment retaliation claim that unpleasant comments in the workplace did not constitute adverse employment action when employee’s evaluations remained consistent after he complained of discriminatory sexual harassment and he was not discharged); *Hooper v. Maryland Dep’t of Human Resources*, No. 94-1067, 1995 WL 8043, at *3 (4th Cir. Jan. 10, 1995) (*per curiam*) (providing that an adverse employment action occurs when an employee is “fired, demoted, passed up for promotion, or not hired”).

The Fifth Circuit and numerous district courts that follow this narrow approach have explicitly relied on the Fourth Circuit’s decision in *Page v. Bolger*, 645 F.2d 227 (4th Cir.) (*en banc*), *cert. denied*, 454 U.S. 892 (1981), in determining what constitutes adverse employment action. *Essary & Friedman*, *supra* note 29, at 135-36 (citing *Mattern*, 104 F.3d 702). In *Page*, a black postal worker alleged that he was denied a promotion because of his race as a result of his employer’s conduct of composing an all-white review committee to make promotion recommendations. *Page*, 645 F.2d at 228-29. The *Page* court refused to uphold the claim, defining actionable discrimination as “ultimate employment decisions” having an “immediate effect upon employment conditions” such as “hiring, granting leave, discharging, promoting, and compensating.” *Id.* at 233. As scholars point out, reliance by other courts on *Page* for this narrow view of what constitutes adverse employment action in Title VII retaliation claims is misplaced because *Page* did not involve the anti-retaliation clause. *Essary & Friedman*, *supra* note 29, at 136.

44. *Essary & Friedman*, *supra* note 29, at 137-38; *see, e.g., Nelson v. Upsala College*, 51 F.3d 383, 389 (3d Cir. 1995) (indicating that post-employment conduct such as refusal to provide a job reference, providing a negative job reference, or discontinuing severance benefits could constitute adverse employment action in Title VII retaliation claims).

harm.⁴⁵ In contrast, a flexible approach is taken by some courts that analyze adverse employment action on a case-by-case basis.⁴⁶ These latter courts are willing to hold actionable a broad range of employer conduct that adversely affects the employee, including “a campaign of co-worker harassment.”⁴⁷

The Fourth Circuit generally takes a narrow approach to determining what constitutes adverse employment action under Title VII. Initially, however, the court refrained from articulating a clear standard for illegal employer conduct under Title VII’s anti-retaliation provision. Thus, in 1984, the term “adverse employment action” did not explicitly appear in the Fourth Circuit’s decision in *Holsey v. Armour & Co.*,⁴⁸ in which the court affirmed a district court’s finding of a pattern and practice of racial discrimination and retaliation.⁴⁹ The *Holsey* court found that retaliation occurred when two senior employees, who had previously filed racial discrimination charges with the EEOC, were prevented from exercising their seniority privilege to “bump” junior employees in another department in order to avoid layoffs in their own department.⁵⁰ The court held that the employer’s manipulation of its “bumping” system, which resulted in the denial of a company privilege to an employee, constituted retaliation.⁵¹ The court did not attempt to characterize retaliation as other than disparate treatment in response to a protected activity, reaching its decision by reasoning that the same employer conduct amounting to unlawful racial discrimination also constituted retaliation because the conduct occurred subsequent to the employee’s attempt to exercise his or her

45. See generally Essary & Friedman, *supra* note 29, at 134-38.

46. *Id.* at 139-40; see, e.g., *Gunnell v. Utah Valley State College*, 152 F.3d 1253, 1264 (10th Cir. 1998) (“[T]his court takes a case-by-case approach to determining whether a given employment action is adverse.”).

47. Essary & Friedman, *supra* note 29, at 139-40 (internal quotation marks omitted) (quoting *Knox v. Indiana*, 93 F.2d 1327, 1335 (7th Cir. 1996)). The Seventh Circuit falls into this third category, and has noted that “adverse actions can come in many shapes and sizes.” *Knox*, 93 F.3d at 1334 (holding that instances of “fellow worker harassment and vicious gossip” following employee’s complaint of sexual harassment was sufficient evidence to support a jury verdict for retaliation under Title VII when employer knew of and tolerated such conduct); see *Gunnell*, 152 F.3d at 1264 (holding that coworker hostility could constitute adverse employment action and explicitly distinguishing its approach from that expounded by the Fourth Circuit in *Munday* and other courts); *Passer v. American Chem. Soc’y*, 935 F.2d 322, 330-31 (D.C. Cir. 1991) (holding that cancellation of a public symposium in employee’s honor constituted adverse employment action).

48. 743 F.2d 199 (4th Cir. 1984).

49. *Id.* at 206-08.

50. *Id.*

51. *Id.* at 207.

rights by complaining about discriminatory practices or filing charges with the EEOC.⁵²

The *Holsey* approach to retaliation under Title VII neither defines actionable employer conduct as adverse employment action nor confines it to specifically defined employer actions.⁵³ In contrast, in *Evans v. Davie Truckers, Inc.*,⁵⁴ decided just one year after *Holsey*, a black truck driver questioned his employer about the fairness of its scheme of compensating black employees.⁵⁵ The employer subsequently called the employee at his home and, stating "if we need you, we'll call you,"⁵⁶ put the senior employee "on standby on the eve of a busy day" while permitting junior employees to work.⁵⁷ In a split panel decision, the majority affirmed the district court's conclusion that the employer's conduct did not constitute "adverse employment action" because the employee had, subsequent to the employer's conduct, signed a separation notice indicating that he voluntarily quit.⁵⁸ The *Evans* court adopted the district court's reasoning that the evidence of the employee's voluntary resignation precluded him from showing that he "suffered adverse employment action [—i.e., termination—] at the hand of the defendants."⁵⁹

In his dissent, Judge Butzner described the district court's narrow approach to adverse employment action, which was adopted by the Fourth Circuit majority, as a "flaw in the . . . court's reasoning."⁶⁰ Judge Butzner particularly criticized the majority's inability to perceive the employer's conduct as adverse employment action when, prior to the separation notice, Evans was placed on standby while "junior employees . . . [were assigned] work that would otherwise have been assigned to him."⁶¹ By adopting the district court's reasoning, the majority in *Evans* effectively avoided answering an important question: "[W]hat caused the company to place Evans . . . on standby on the eve of a busy day?"⁶²

The *Evans* court's view of adverse employment action reflects a departure from the approach to retaliation in earlier cases such as

52. See *id.* at 207, 215.

53. See *supra* notes 43-45 and accompanying text (discussing courts that define adverse employment action as specific employment-related decisions or detriments).

54. 769 F.2d 1012 (4th Cir. 1985).

55. *Id.* at 1013.

56. *Id.*

57. *Id.* at 1015 (Butzner, J., concurring in part and dissenting in part).

58. *Evans*, 769 F.2d at 1014.

59. *Id.* at 1014 (internal quotation marks omitted).

60. *Id.* at 1015-16 (Butzner, J., concurring in part and dissenting in part).

61. *Id.* at 1015.

62. *Id.* at 1016.

Holsey by issuing a standard that focuses largely on the effect of the employer's conduct, rather than the employer's intent to treat an employee harshly because she participated in a protected activity. This view requires the court to center on an ultimate employment consequence, such as termination, and then determine if it was the immediate result of the employer's conduct. Thus stated, the *Evans* interpretation of adverse employment action paved the way for the Fourth Circuit's current view of this element, a view that limits adverse employment action to substantial and tangible employment-related harm that directly flows from the employer's conduct.

Despite Judge Butzner's dissent in *Evans*, in which he argued that the relevant inquiry should be the employer's intent—that is, whether the employee was treated differently than her coworkers, and, if so, *why*?⁶³—as well as a trend calling for a more expansive view of adverse employment action in other courts,⁶⁴ the Fourth Circuit has continued its narrow view of adverse employment action, confining actionable retaliation claims to employer conduct that has an immediate, substantial and tangible effect on employment conditions.⁶⁵

c. Intolerable Conditions: Constructive Discharge as Adverse Employment Action.—Simply put, the Fourth Circuit has narrow limits regarding what may constitute adverse employment action in Title VII retaliation claims.⁶⁶ It has, nonetheless, recognized that a constructive discharge may constitute an adverse employment action because it is an ultimate employment consequence.⁶⁷ The Fourth Circuit's standard for actionable employer conduct in constructive discharge

63. See *supra* note 62 and accompanying text (quoting from Judge Butzner's response to the Fourth Circuit majority's decision in *Evans*).

64. See *supra* notes 46-47 and accompanying text (discussing the broader approach to adverse employment action in Title VII retaliation claims).

65. See, e.g., *Hopkins v. Baltimore Gas & Elec. Co.*, 77 F.3d 745, 754-55 (4th Cir. 1996) (holding in sexual harassment retaliation claim that unpleasant comments in the workplace did not constitute adverse employment action when employee's evaluations remained consistent after he complained of discriminatory sexual harassment and he was not discharged); *Hooper v. Maryland Dep't of Human Resources*, No. 94-1067, 1995 WL 8043, at *3 (4th Cir. Jan. 10, 1995) (*per curiam*) (providing that an adverse employment action occurs when an employee is "fired, demoted, passed up for promotion, or not hired"); *Boorman v. Sullivan*, 769 F. Supp. 904, 911 (D. Md. 1991) (noting that the Fourth Circuit has consistently concluded that an adverse employment decision requires a finding of "affirmative harm" to the plaintiff's employment position, which did not occur when plaintiff received a promotion that was less favorable than she desired).

66. See *supra* notes 48-65 and accompanying text (providing an overview of the Fourth Circuit's narrow approach to adverse employment action).

67. *Holsey v. Armour & Co.*, 743 F.2d 199, 209 (4th Cir. 1984) ("A constructive discharge violates [Title VII's anti-retaliation provisions] when the record discloses that it was in retaliation for the employee's exercise of rights protected by the Act.").

claims under Title VII, however, is stricter than its view of adverse employment action in retaliation claims.⁶⁸ As a consequence, it is unlikely that employees who resign will prevail in retaliation claims, particularly when the alleged adverse employment action is a constructive discharge.

The standard for constructive discharge in Title VII cases was largely adopted from earlier labor cases in the Fourth Circuit. In *Holsey v. Armour & Co.*,⁶⁹ an employee claimed that constructive discharge had occurred in the context of a retaliation claim.⁷⁰ The Fourth Circuit articulated a two-part standard for constructive discharge: there must be (1) a deliberate intent on the part of the employer to (2) render the employee's working conditions so intolerable that he or she would be compelled to quit.⁷¹ Applying this standard, the *Holsey* court held that intolerable conditions existed for a Title VII plaintiff because his employer denied him a promotion on numerous occasions and only promoted him to a supervisory position after he had filed an EEOC charge.⁷² The employer then denied the plaintiff equal status by constantly adjusting shifts to accommodate white supervisors, granting leave to his subordinates without advising him, continually ignoring his complaints about his unequal treatment, and rejecting his requests for transfer.⁷³ The *Holsey* court looked at the entire scope of the employer's conduct and determined that this employee was not "only denied equal status with white supervisors," but was also "systematically harassed."⁷⁴ Furthermore, the *Holsey* court noted that the employer's lack of attention to the plaintiff's complaints about his unequal treatment sufficed as evidence of the employer's intent to create intolerable working conditions.⁷⁵

Lower court decisions involving constructive discharge in Title VII claims held that the employment conditions necessary to satisfy the element of intolerable conditions must be particularly severe—

68. See *infra* notes 76-91 and accompanying text (discussing the evolution in the Fourth Circuit of the strict standard that must be satisfied to establish a constructive discharge claim under Title VII).

69. 743 F.2d 199 (4th Cir. 1984).

70. *Id.* at 209.

71. *Id.* (quoting *J.P. Stevens & Co. v. NLRB*, 461 F.2d 490, 494 (4th Cir. 1972)).

72. *Id.*

73. *Id.*

74. *Id.*

75. *Id.* Significantly, the *Holsey* court noted that direct evidence of an employer's deliberate intent is not necessary. *Id.* Rather, "[c]ircumstantial proof suffices" to establish this element of a constructive discharge claim. *Id.* (citing *United States Postal Servs. v. Aikens*, 460 U.S. 711, 714 n.3 (1983)).

disparate treatment alone did not suffice.⁷⁶ Thus, in *Sparrow v. Piedmont Health Systems Agency, Inc.*,⁷⁷ a plaintiff's claim of constructive discharge failed when she resigned due to her perception that she had "suffered a gross professional insult" after she failed to receive a promotion that was granted to an equally qualified male coworker.⁷⁸ The *Sparrow* court reasoned that "Title VII does not . . . provide a remedy for such disappointed expectations."⁷⁹ Moreover, the court concluded that the employer's attempt to persuade the plaintiff not to resign belied her claim that the employer's conduct was deliberately intended to force a resignation.⁸⁰

The next year, in *Bristow v. Daily Press, Inc.*,⁸¹ the Fourth Circuit heard an appeal from a finding by a district court that an employee was constructively discharged in violation of the Age Discrimination in Employment Act.⁸² The plaintiff in *Bristow* claimed that his employer denied him promotions and assigned him to a work region with "unique problems" in an effort to force him to resign because of his age.⁸³ The *Bristow* court articulated an objective standard for determining if the element of intolerable conditions is satisfied: "whether a 'reasonable person' in the employee's position would have felt compelled to resign."⁸⁴ Finding that the promotions were not denied because of age and that the assigned region did not involve problems different from other regions, the court held that the employee had not experienced intolerable conditions and, thus, was not constructively discharged. The *Bristow* court emphasized that "[a]n employee may not be unreasonably sensitive to his working environment"⁸⁵ and that "the law does not permit an employee's subjective perceptions to govern a claim of constructive discharge."⁸⁶ Furthermore, the *Bristow* court stated that, although "[a]n employee is protected from a calculated effort to pressure him into resignation through the imposition of unreasonably harsh conditions, in excess of those faced by his co-

76. See, e.g., *Bourque v. Powell Elec. Mfg. Co.*, 617 F.2d 61, 65-66 (5th Cir. 1980) (holding that unequal pay, although relevant, does not alone form the basis for a finding of constructive discharge).

77. 593 F. Supp. 1107 (M.D.N.C. 1984) (mem.).

78. *Id.* at 1117 (internal quotation marks omitted).

79. *Id.* at 1117-18.

80. *Id.* at 1118.

81. 770 F.2d 1251 (4th Cir. 1985).

82. *Id.* at 1252.

83. *Id.*

84. *Id.* at 1255 (citations omitted).

85. *Id.* (internal quotation marks omitted) (quoting *Johnson v. Bunny Bread Co.*, 646 F.2d 1250, 1256 (8th Cir. 1981)).

86. *Id.*

workers[,] [h]e is not . . . guaranteed a working environment free of stress."⁸⁷

In reversing the trial court's finding of constructive discharge, the *Bristow* court emphasized that the problems the plaintiff experienced were no more severe than those of other employees in his position.⁸⁸ Moreover, the appellate court concluded that the plaintiff's desire to be reinstated contradicted his claim that conditions were so intolerable that he felt compelled to resign.⁸⁹ Therefore, the *Bristow* court held that the plaintiff's situation encompassed no more than "universal workday frustrations" and a reasonable person in his position would not have been forced to resign.⁹⁰

The Fourth Circuit has continued to apply the *Bristow* two-pronged standard in Title VII constructive discharge claims, requiring objectively intolerable conditions that are particularly severe as well as a deliberate intent on the part of the employer to force the employee to resign.⁹¹

3. *The Court's Reasoning.*—In *Munday v. Waste Management of North America, Inc.*, the Fourth Circuit reversed the district court's findings of retaliation, specifically concluding that Munday had not been

87. *Id.*

88. *Id.* at 1255-56.

89. *Id.* at 1256.

90. *Id.* at 1255-56.

91. *See, e.g.,* *Amirmokri v. Baltimore Gas & Elec. Co.*, 60 F.3d 1126, 1132 (4th Cir. 1995) (finding that intolerable conditions sufficient to constitute constructive discharge could exist when an employee was persistently ridiculed publicly and subjected to epithets about his national origin by his supervisor and coworkers to the extent that the stress he experienced caused him to get an ulcer and eventually resign). Not all courts currently follow the Fourth Circuit's two-part approach to constructive discharge in Title VII discrimination claims. One scholar states that the Fourth Circuit view is the minority view, with the majority view omitting the requirement for intent and instead focusing almost wholly on whether "a reasonable person would have found the discriminatory conditions to be intolerable." Comment, *Constructive Discharge Under Title VII and the ADEA*, 53 U. CHI. L. REV. 561, 562 (1986). However, even among courts that decline to follow the Fourth Circuit's view, there is some variation. Some courts hold that employers are liable for the reasonably foreseeable consequences of their conduct, because they were likely to have intended them. *Id.* at 564. Still other courts have held that evidence of the employer's specific intent and foreseeability of consequences are significant factors rather than a required element. *See id.* at 564-65. All courts, however, require objectively intolerable conditions, and the general rule is that intolerable conditions require employer conduct more severe than an arrant instance of disparate treatment. *See id.* at 565. Furthermore, courts that require intent normally do not demand direct evidence of specific intent, but rather permit indirect evidence to satisfy the intent requirement. *Id.* at 568; *see, e.g., supra* note 75 and accompanying text (discussing the Fourth Circuit's reasoning regarding a finding of employer intent in *Holsey*).

constructively discharged.⁹² The *Munday* court affirmed, however, the lower court's conclusion that Waste Management breached its settlement agreement with Munday.⁹³

a. *Adverse Employment Action*.—The Fourth Circuit reviewed Munday's retaliation claim and found that, as a matter of law, her employer's conduct did not constitute an adverse employment action.⁹⁴ The *Munday* court first noted the district court's finding that Robert Bohager, Waste Management's general manager, by virtue of his conduct of yelling at Munday during a meeting, instructing her coworkers to ignore and spy on her, and ignoring her complaints, engaged in a "pattern of retaliation."⁹⁵ The *Munday* court further conceded the lower court's finding that Bohager knew of Munday's employment-related complaints and that his "fail[ure] to act appropriately" was deliberate in that he expected that his conduct would eventually cause Munday to resign from her job.⁹⁶

On the basis of these undisputed facts, the Fourth Circuit held, in a split panel decision, that Waste Management's conduct did "not rise to the level of an adverse employment action for Title VII purposes."⁹⁷ The *Munday* court limited the district court's findings regarding Bohager's actions and refused to hold that his "pattern" of conduct constituted illegal retaliation.⁹⁸ Judge Widener, writing for the majority, concluded that no case in the Fourth Circuit ever found "an adverse employment action to encompass a situation where the employer has [yelled at and] instructed employees to ignore and spy on an employee who engaged in protected activity, without evidence that the terms, conditions, or benefits of her employment were adversely affected."⁹⁹ The court conceded that Bohager ignored Munday's complaints but, emphasizing that her employment-related complaints were investigated and corrected where appropriate, the court reasoned that this aspect of Bohager's conduct was not signifi-

92. See *supra* note 26 (discussing the *Munday* court's determination that the essence of the district court's decision was that Munday's constructive discharge was an adverse employment action in violation of Title VII's anti-retaliation provision).

93. *Munday*, 126 F.3d at 243-45.

94. *Id.* at 243.

95. *Id.* (quoting *Munday*, 858 F. Supp. at 1374).

96. *Id.*

97. *Id.*

98. *Id.*

99. *Id.* (citing *Hopkins v. Baltimore Gas & Elec. Co.*, 77 F.3d 745, 754 (4th Cir. 1996); *DiMeglio v. Haines*, 45 F.3d 790, 804 & n.6 (4th Cir. 1995); *Bristow v. Daily Press, Inc.*, 770 F.2d 1251, 1254 (4th Cir. 1985); *Evans v. Davie Truckers, Inc.*, 769 F.2d 1012, 1014 (4th Cir. 1985)).

cant to the court's conclusion regarding adverse employment action.¹⁰⁰

b. Constructive Discharge as Adverse Employment Action.—Judge Widener supported his interpretation of adverse employment action by citing to three cases in which employees claimed, unsuccessfully, that their employers' conduct constituted adverse employment action.¹⁰¹ Though not all of these cases involved Title VII retaliation claims, the unifying element among them is that each employee ultimately chose to terminate their employment and then later alleged adverse employment action.¹⁰² Thus, the *Munday* court next turned to review separately the precise issue raised by Waste Management: whether the facts as stated by the district court supported its conclusion that intolerable working conditions were present as a matter of law.¹⁰³

To determine whether Munday's working conditions were intolerable, the Fourth Circuit applied "the objective standard of whether a 'reasonable person' in [Munday's] position would have felt compelled to resign."¹⁰⁴ The court began its analysis by emphasizing that an employer's conduct must be particularly severe to satisfy a claim of constructive discharge.¹⁰⁵ The court cited *Bristow* for the proposition that although "[a]n employee is protected from a calculated effort to pressure him into resignation through the imposition of unreasonably harsh conditions, in excess of those faced by his coworkers[,] [h]e is

100. *Munday*, 126 F.3d at 243.

101. See *id.*; see also *supra* note 99 (listing the cases cited by the *Munday* court in support of its interpretation of adverse employment action).

102. See *Hopkins*, 77 F.3d at 754 (holding in Title VII retaliation claim that adverse employment action had not been taken against an employee whose job was eliminated upon the company's reduction in force and restructuring and who was also subject to innocuous comments and inconsequential reprimands; the employee was offered a transfer but chose, instead, to terminate his employment); *Bristow*, 770 F.2d at 1254 (holding in an ADEA claim alleging constructive discharge that employer's conduct of assigning plaintiff to a difficult work region did not amount to adverse employment action when the work region's difficulties were no different than in other work regions and the employee ultimately chose to terminate his employment); *Evans*, 769 F.2d at 1014 (holding in a Title VII claim of retaliation based on an alleged constructive discharge that employer's conduct of putting a senior employee on standby while allowing junior employees to continue working did not constitute adverse employment action when the employee eventually signed a voluntary separation agreement).

103. *Munday*, 126 F.3d at 243.

104. *Id.* (internal quotation marks omitted) (quoting *Bristow*, 770 F.2d at 1255).

105. *Id.* (citing *Bristow*, 770 F.2d at 1255).

not, however, guaranteed a working environment free of stress.”¹⁰⁶ Conceding the district court’s findings that Munday “had to cope with being ignored both by her co-workers and by the top supervisor[,]”¹⁰⁷ the Fourth Circuit reasoned that such conduct alone was not sufficient to establish adverse employment action and, therefore, could not be sufficient to establish that her conditions were intolerable. The court emphasized that Munday’s complaints had been addressed, her employment status was not altered, and she did not receive any reprimands or poor evaluations.¹⁰⁸ Moreover, the court noted, Munday “never complained [to Waste Management] about being ignored,” she did not provide any evidence that she had actually been spied upon, and she did not resign until seventeen months after the conduct occurred that formed the basis of her complaint.¹⁰⁹ Thus, the *Munday* court held that “notwithstanding either [her manager’s] intent to persuade her to resign or the fact that he successfully made her working environment unpleasant,” Munday’s situation lacked the degree of severity necessary to constitute intolerable working conditions.¹¹⁰

c. Breach of Contract: The Settlement Agreement’s Anti-Retaliation Provision.—After reversing the district court’s decision regarding retaliation, the *Munday* court upheld the lower court’s ruling against Waste Management for breach of contract.¹¹¹ The court noted that the settlement agreement between Waste Management and Munday explicitly prohibited “retaliation of any kind.”¹¹² The court reasoned that the formulation “retaliation of any kind,” while related to section 704(a) of Title VII, is not identical to the statutory prohibition against discrimination against those who engage in protected activities and, thus, requires a lesser standard of proof than adverse employment action under Title VII.¹¹³ Therefore, based on the undisputed findings of fact, the Fourth Circuit concluded that the district court was correct in concluding that Waste Management had breached the settlement

106. *Id.* (quoting *Bristow*, 770 F.2d at 1255); see also *supra* notes 81-90 and accompanying text (discussing the *Bristow* court’s conclusion that employees cannot be unreasonably sensitive about their working conditions).

107. *Munday*, 126 F.3d at 243 (internal quotation marks omitted) (quoting *Munday*, 858 F. Supp. at 1376).

108. *Id.*

109. *Id.*

110. *Id.*

111. *Id.* at 245.

112. *Id.*

113. *Id.* at 245 & n.6.

agreement by "intentionally making [Munday's] working conditions unpleasant" because of her protected activity.¹¹⁴

d. *The Dissenting Opinion: Objecting to the Fourth Circuit View of Constructive Discharge.*—In his dissent, Judge Heaney disagreed with the majority's conclusion that Munday's employment situation did not constitute intolerable conditions necessary to support her claim of constructive discharge and would have affirmed the district court's finding of retaliation under Title VII.¹¹⁵ Following Fourth Circuit precedent, Judge Heaney characterized Waste Management's conduct of ignoring Munday and directing her coworkers to follow suit with the intent of forcing her to resign, as "unreasonably harsh conditions, in excess of those faced by her co-workers," and, thus, sufficient to meet the standard for constructive discharge under *Bristow*.¹¹⁶ Judge Heaney opined that Waste Management's conduct alienated Munday to the point that she could no longer perform her job, stating: "I cannot imagine anything worse for an employee than to work in an environment in which co-workers refuse to speak or associate with her any more than is absolutely essential to carry out their respective jobs."¹¹⁷

Moreover, Judge Heaney disagreed with the majority's view that Munday's delay in resigning contradicted her claim of intolerable working conditions because the environment of alienation persisted throughout her tenure at Waste Management after her reinstatement.¹¹⁸ He then noted that in the decision to uphold Munday's breach of contract claim, the majority specifically concluded that Waste Management deliberately made Munday's work environment unpleasant because she had filed a claim with the Office of Human Rights. Thus, Judge Heaney reasoned, because Waste Management deliberately created an environment that constituted "unpleasant" conditions, her claim of constructive discharge was satisfied, and, therefore, the district court's decision regarding retaliation under Title VII should have been affirmed.

4. *Analysis.*—

a. *The Fourth Circuit View of Section 704(a): Does Narrowly Construing Title VII Allow Employers to "Retaliate"?*—Courts have determined

114. *Id.* at 245.

115. *Id.* at 245-46 (Heaney, J., concurring in part and dissenting in part).

116. *Id.* (internal quotation marks omitted) (quoting *Bristow v. Daily Press, Inc.*, 770 F.2d 1251, 1255 (4th Cir. 1985)).

117. *Id.* at 246.

118. *Id.*

that actionable retaliation under section 704(a) of Title VII requires discrimination on the part of the employer that materially or adversely affects the terms or conditions of employment.¹¹⁹ As the *Munday* decision illustrates, the Fourth Circuit's view of actionable employer conduct under section 704(a) is limited by prior decisions regarding the element of adverse employment action. In essence, the Fourth Circuit has always required a retaliation plaintiff to show that she suffered tangible employment-related harm as the result of her employer's conduct by demanding an adverse employment action that consists of either an ultimate employment decision or a substantial impairment to the plaintiff's employment opportunities.¹²⁰ Following Fourth Circuit precedent, the *Munday* court's conclusion that Waste Management's conduct did not constitute an adverse employment action as a matter of law is proper. In the Fourth Circuit, the harm that Munday suffered—alienation and “emotional upset”¹²¹ at the hands of her superior and coworkers—simply did not amount to a violation of section 704(a). There was no ultimate employment decision or substantial and tangible effect on Munday's employment conditions that directly flowed from Waste Management's conduct. The view of adverse employment action in *Munday* is, thus, consistent with prior Fourth Circuit decisions involving alleged violations of 704(a), as well as with decisions in other circuits employing a similarly narrow view of adverse employment action.¹²²

The *Munday* decision further reflects the court's persistent refusal to stray from a narrow interpretation of Title VII. Section 704(a) is regarded as Title VII's anti-retaliation provision, and courts apply the term “retaliation” in claims involving alleged violations of section 704(a). The language of Title VII, however, does not explicitly include the term “retaliation,” rather it makes it unlawful for employers to “discriminate” against those who assert rights protected by Title VII's substantive anti-discrimination provisions.¹²³ The Fourth Circuit view, as demonstrated by the *Munday* decision, is that section 704(a)

119. See *supra* notes 42-47 and accompanying text (providing an overview of the courts' approaches to the requirement for an adverse employment action under section 704(a) of Title VII).

120. See *supra* notes 48-65 and accompanying text (describing the evolution of the Fourth Circuit's narrow approach to adverse employment action under section 704(a) of Title VII).

121. *Munday*, 858 F. Supp. at 1379.

122. See *supra* notes 43-45 and accompanying text (describing the narrow view of adverse employment action taken by many courts).

123. See *supra* note 36 and accompanying text (providing text of section 704(a) of Title VII).

prohibits employment "discrimination" but does not protect employees who engage in protected activity from any and all ensuing acts of employer "retaliation" that may occur in the workplace. The Fourth Circuit in *Munday* suggests the following: If section 704(a) were intended to function as a broad anti-retaliation provision, the language of Title VII would have expressly included the term "retaliation."

The *Munday* court's reasoning in upholding the district court's finding for Munday on her breach of contract claim provides an apt illustration of its view of section 704(a)'s reach. In *Munday*, the court specifically pointed to the language of the settlement agreement and distinguished its prohibition against "retaliation of any kind" from the unlawful employment practice prohibited by 704(a).¹²⁴ The court noted that the two provisions are not identical and that the standard for retaliation under the settlement agreement is lower than the standard for actionable employer conduct under section 704(a).¹²⁵

In determining whether the standard for retaliation under the settlement agreement was satisfied, the *Munday* court explicitly recognized that Waste Management's general manager Robert Bohager intended to make Munday's work environment unpleasant because she filed charges with the Office of Human Rights,¹²⁶ which reflects the court's acknowledgment that Waste Management engaged in intentional "retaliation" against Munday for participating in a protected activity. In juxtaposing the court's narrow approach to section 704(a) against its approach to "retaliation" under the contract claim, the Fourth Circuit asserts its position that section 704(a) is not meant to function as Title VII's broad retaliation proscription because some intentional employer "retaliation" may be beyond the reach of Title VII.

The limited reach of section 704(a) as reflected in *Munday* clarifies the Fourth Circuit's view of both section 704(a) in particular and Title VII in general—a view that is consistent with both the language and purpose of Title VII as it was originally enacted for the prevention and deterrence of discrimination in employment. Courts have explicitly stated that Title VII was not intended to address all offensive conduct in the workplace but, rather, only conduct that interferes with equal opportunities for women and minorities in employment.¹²⁷

124. See *Munday*, 126 F.3d at 245 & n.6.

125. *Id.*

126. *Id.* at 243, 245.

127. See, e.g., *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993) (noting in a Title VII hostile work environment claim that "'mere utterance of an . . . epithet which engenders offensive feelings in a [sic] employee' . . . does not sufficiently affect the conditions of employment to implicate Title VII" (quoting *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 67 (1986))); *Hopkins v. Baltimore Gas & Elec. Co.*, 77 F.3d 745, 754 (4th Cir. 1996) ("Title

Narrowly defining actionable retaliation in an effort to serve Title VII's original purpose and to prevent expansion of the statute's reach may, however, thwart Congress's attempt to further the effectiveness of Title VII by amending it in 1991.

The 1991 amendment to Title VII followed Congress's finding that additional remedies and legislation were needed to deter and protect against unlawful harassment and intentional discrimination in the workplace.¹²⁸ While the traditional remedy for Title VII plaintiffs was usually limited to "make-whole" relief,¹²⁹ under the 1991 Act employers may now be liable for compensatory and punitive damages for such intentional discrimination or harassment.¹³⁰ The institution of these new remedies invites the question of whether Congress intended to expand the scope of actionable employer conduct under Title VII. Indeed, some courts recently have taken a more expansive approach to what constitutes actionable conduct under section 704(a), looking at adverse employment action on a case-by-case basis and allowing juries to make the ultimate decision regarding adverse employment action.¹³¹ The Fourth Circuit in *Munday*, however, decided as a matter of law that the 1991 amendment necessitated a change only in the remedies available to victims of discrimination in employment, and not a change in what constitutes unlawful employer conduct.

The *Munday* court allowed the lack of tangible effect of Waste Management's conduct on Munday's employment conditions to override Waste Management's motivation for and success in making her working conditions unpalatable. In this sense, the *Munday* decision is disconcerting. By focusing on the effect of the employer's conduct, and by limiting actionable retaliation only to tangible employment-

VII was not designed to create a federal remedy for all offensive language and conduct in the workplace."); *Crowley v. Prince George's County*, 890 F.2d 683, 687 (4th Cir. 1989) (noting in a retaliation claim that "Title VII is not a general 'bad acts' statute"); see also Ray, *supra* note 29, at 407 (stating that the amendments to Title VII have created a "new federal employment tort").

128. See 42 U.S.C. § 1981a note (1994) (Congressional Findings) (concluding that "additional remedies under Federal law are needed to deter unlawful harassment and intentional discrimination in the workplace"); see also *supra* note 29 (providing background for the 1991 amendments to Title VII of the Civil Rights Act).

129. See *supra* note 29 (discussing the emphasis on "make-whole" relief prior to the 1991 amendments).

130. See *supra* note 29 (discussing additional remedies available under Title VII as amended in 1991).

131. See *supra* notes 46-47 and accompanying text (addressing the broad, case-by-case approach to adverse employment action taken by some courts which have expanded actionable employer conduct by, for example, finding that coworker hostility could constitute actionable retaliation).

related harm, the *Munday* ruling may result in foreclosing the possibility of recovery for future Title VII plaintiffs. These plaintiffs may be denied recovery even though certain intangible factors, such as damage to an employee's reputation and social status at her place of employment, may interfere with her ability to perform her job. Most disturbing, however, is the *Munday* decision's message that under Title VII employers may lawfully engage in a calculated plan of "retaliation" as long they are careful—or clever enough—not to impose a serious or tangible employment-related detriment upon their victims.

b. Constructive Discharge: Precluding Recovery under Title VII for Employees who Voluntarily Resign.—The Fourth Circuit has always employed a high standard for claims of constructive discharge under Title VII, requiring intolerable working conditions to be particularly severe.¹³² For example, while an employee's subjective perception of extensive stress normally will not be actionable,¹³³ discriminatory conduct causing stress that results in a physical condition such as an ulcer may be actionable.¹³⁴ The *Munday* decision is thus consistent with Fourth Circuit case law addressing the requirement for intolerable working conditions because the district court found that Munday's perception of her working conditions resulted only in "emotional upset" rather than a more serious condition that would impair her ability to perform her job or otherwise substantially affect her employment conditions.¹³⁵

Judge Heaney dissented vehemently to the majority's conclusion in *Munday*, contending that the atmosphere of alienation should constitute "unreasonably harsh" conditions under *Bristow*.¹³⁶ Munday's situation, as characterized by the district court, however, was similar to Bristow's in that each perceived that the working conditions were unreasonably harsh, when in actuality the conditions were not as severe

132. See *supra* notes 66-85 and accompanying text (discussing the Fourth Circuit's view of constructive discharge); see also *infra* notes 133-134.

133. See, e.g., *Bristow v. Daily Press, Inc.*, 770 F.2d 1251, 1255 (4th Cir. 1985) (concluding that "an employee's subjective perceptions [do not] govern a claim of constructive discharge"); see also *Sparrow v. Piedmont Health Sys. Agency, Inc.*, 593 F. Supp. 1107, 1117-18 (M.D.N.C. 1984) (mem.) (noting that "disappointed expectations" are not sufficient to constitute a constructive discharge); see also notes 77-91 and accompanying text (discussing the *Bristow* and *Sparrow* decisions in detail).

134. See *Amirmokri v. Baltimore Gas & Elec. Co.*, 60 F.3d 1126, 1132 (4th Cir. 1995) (finding that an employee suffered intolerable working conditions when he developed an ulcer as a result of public humiliation caused by his coworkers and supervisor); see also *supra* note 91 and accompanying text.

135. See *Munday*, 858 F. Supp. at 1379; see also *supra* notes 119 and accompanying text.

136. *Munday*, 126 F.3d at 245-46 (Heaney, J., concurring in part and dissenting in part).

as their subjective impressions led them to believe. Therefore, Munday's constructive discharge claim was not actionable because she did not experience the level of severe harm required by the Fourth Circuit to achieve intolerable working conditions.¹³⁷

By setting forth a strict standard demanding objective evidence of severe harm, the Fourth Circuit approach provides heightened protection to employers from liability to disgruntled employees who quit and later decide that they were forced to resign by their employers. In addition, the *Munday* approach prevents employees from playing the part of judge and walking off the job for every workplace grievance. Further, the *Munday* decision clarifies the Fourth Circuit's narrow approach to constructive discharge, and it appears to offer rough guidelines for what may constitute intolerable working conditions.

In assessing the existence of intolerable working conditions, the Fourth Circuit favors concrete evidence indicating that the employee has suffered due to her employer's conduct. For example, the court will consider whether an employer fails to address an employee's employment-related complaints.¹³⁸ Yet as the *Munday* decision indicates, if such complaints are ignored by one manager but investigated and corrected by other employees, the employee's claim may fail.¹³⁹ The court will also consider whether the plaintiff can show that her employment status was altered and whether she received a reprimand or an unsatisfactory evaluation.¹⁴⁰ Furthermore, the *Munday* court stipulates that the length of time between the employer's alleged retaliatory conduct and the employee's resignation will be considered strongly in retaliatory constructive discharge claims.¹⁴¹

Thus, the *Munday* decision suggests that employer conduct that results in alienation of an employee will not render working conditions intolerable unless it is manifested in concrete ways. Under *Munday*, an employee alleging constructive discharge will certainly fail unless she shows that she experienced specific instances of measurable harm. Conduct resulting in subjective harm such as internal feelings of alienation will most likely not be considered a constructive discharge. Therefore, if an employee alleges that she resigned from her job because her employer intentionally created an atmosphere

137. See *supra* notes 104-110 and accompanying text (discussing the *Munday* court's application of standards provided by the *Bristow* court for determining whether an employee-plaintiff experienced intolerable working conditions).

138. *Munday*, 126 F.3d at 244.

139. See *id.* at 243-44.

140. *Id.* at 244.

141. *Id.* (noting that Munday did not resign until seventeen months after the events forming the basis of her claim occurred).

where she was ostracized and spied upon, she must first voice her specific complaints to her employer.¹⁴² In addition, an employee who alleges that her employer convinced coworkers to participate in creating unreasonably harsh working conditions by, for example, spying on her and reporting her actions to management, must present specific evidence that such activities actually occurred.¹⁴³

The Fourth Circuit's strict approach to constructive discharge makes it difficult, if not impossible, for an employee alleging a violation of section 704(a) to recover if, ultimately, she voluntarily resigned from her job. The relationship between the Fourth Circuit's high standard for intolerable conditions for a constructive discharge under Title VII and the court's narrow view of adverse employment action under 704(a) is such that, in most cases, a plaintiff will not be able to show that her employer's conduct amounted to a constructive discharge, and, consequently, she will not be able to show that she suffered from an adverse employment action. The *Munday* court thus sends out a clear message to employees who believe that their employers have discriminated against them or retaliated against them for exercising their rights: Employees who voluntarily resign from their jobs risk being precluded from recovery under Title VII.

5. *Conclusion.*—The Fourth Circuit in *Munday*, by narrowly defining the scope of protection available to employees under section 704(a) of Title VII and confining adverse employment action to tangible employment-related harm, set forth its view that 704(a) is not Title VII's comprehensive retaliation proscription. In addition, the *Munday* court narrowly construed the theory of constructive discharge, effecting a difficult standard for intolerable conditions. The result is that recovery under Title VII is now virtually impossible for plaintiffs alleging a violation of section 704(a) who voluntarily resigned as a result of perceived employer retaliation. The *Munday* decision is consistent with prior Fourth Circuit precedent as well as the language and original purpose of Title VII. We may also benefit from *Munday* in terms of guidance for future retaliation and constructive discharge claims. The *Munday* ruling, nonetheless, is dangerous to future Title VII plaintiffs because it narrowly prescribes the scope of conduct that may

142. See *id.* (noting that *Munday* never complained to her employer about being ignored by her coworkers and supervisor).

143. See *id.* ("[T]here is no evidence that any co-worker actually spied on her or reported her statements to Bohager or other management.").

be actionable and invites employers to engage in—albeit with care—intentional “retaliation.”

RACHEL M. WOLF

III. TRADEMARKS

A. *Incontestability: Now You See It, and Now You Don't*

In *Petro Stopping Centers, L.P. v. James River Petroleum, Inc.*,¹ the United States Court of Appeals for the Fourth Circuit held that the "PETRO CARD" trademark of James River Petroleum, Inc. (JRP) did not cause a "likelihood of confusion" with Petro Stopping Centers' (PSC) marks.² The Fourth Circuit also held that the incontestability³ of PSC's marks did not prevent the district court from finding the PSC marks to be "descriptive and weak"; therefore, JRP's trademarks did not infringe PSC's.⁴ With this holding, the Fourth Circuit has solidified the case law on the doctrine of incontestability by following the guidance and intent of Congress, while adequately balancing the competing interests of trademark law.

1. *The Case.*—In 1975, PSC began providing full-service rest stop facilities adjacent to interstate highways for use both by the general public and commercial truckers.⁵ PSC operates and franchises these centers under the marks "PETRO STOPPING CENTER" and "PETRO TRAVEL PLAZA."⁶ PSC has many facilities throughout the nation, including two in Virginia.⁷ The services provided at PSC range from fuel and automotive services to movie theaters and barber shops.⁸ PSC advertises extensively, directed mainly at truckers, and claimed an estimated revenue of over \$2 billion in one five-year period.⁹

1. 130 F.3d 88 (4th Cir. 1997), *cert. denied*, 118 S. Ct. 1561 (1998).

2. *Id.* at 90-91, *aff'g* 41 U.S.P.Q.2d (BNA) 1853 (E.D. Va. 1997). See *infra* note 10 for examples of PSC's registered trademarks.

3. Section 15 of the Lanham Act provides that "the right of [a] registrant to use [a] registered mark in commerce for the goods or services on or in connection with which such registered . . . mark shall be incontestable" if (1) the mark has been in continuous use for five years, (2) there has been no final decision adverse to the right of use of the mark, (3) there is no pending proceeding concerning the right to use the mark, (4) the registrant has filed an affidavit with the PTO attesting to the above requirements, and (5) the mark has not become the "generic" name for goods or services. 15 U.S.C. § 1065 (1994).

4. *Petro Stopping Ctrs.*, 130 F.3d at 90, 92.

5. *Id.* at 90.

6. *Id.*

7. *Id.* PSC operates over forty facilities that are located in twenty-seven states. *Id.* The two facilities in Virginia were located in Ruther Glen and Fort Chiswell. *Id.*

8. *Id.* The services provided by PSC include "separate fueling areas for cars and trucks, truck maintenance, truck weighing scales, truck washes, restaurants, retail stores, fax machines, ATM machines, showers, laundry, quiet rooms, game rooms, television rooms, movie theaters, and barber shops." *Id.* The facilities were operated twenty-four hours a day, and PSC accepted all forms of payment, including cash, checks, credit cards, and a "PETRO" card. *Id.*

9. *Id.* PSC advertises in special publications for truckers, truck stop directories, on billboards, on Virginia Department of Transportation exit signs, and on radio. *Id.* PSC

PSC had registered fourteen federal trademarks that contained the word "PETRO."¹⁰ One of its trademarks covered the word "PETRO" alone with background colors that were distinctive to PSC.¹¹ Eight of PSC's trademarks, including the PETRO mark, had attained "incontestable" status under the Lanham Act.¹²

In 1992 JRP, a petroleum distribution company, entered into the business of directly selling fuel to commercial fleets through a "card lock" system.¹³ In the "card lock" business, a commercial fleet owner purchases an "account" from JRP (or any other member of the Commercial Fueling Network (CFN)),¹⁴ which allows drivers of the commercial fleet to purchase fuel from unmanned, self-service filling stations via a payment card.¹⁵ JRP operated five such filling stations in the Richmond, Virginia area; none of these stations were adjacent to interstate highways or near any PSC facilities.¹⁶ JRP employed a limited advertising campaign directly aimed at obtaining commercial accounts.¹⁷ JRP used the trademark "JAMES RIVER PETRO CARD" to identify its facilities.¹⁸

On July 1, 1996, PSC sued JRP in the United States District Court for the Eastern District of Virginia,¹⁹ alleging, *inter alia*, federal and common law trademark infringement.²⁰ The district court held for

estimated at trial that this advertising had cost \$6.25 million over the five years prior to litigation. *Id.*

10. *Id.* Examples of PSC's registered marks include: "PETRO PRIDE," "PETRO:LUBE," "PETRO:2," "PETRO:PLUS," and "PETRO:TREAD." *Id.* PSC registered its first mark, "PETRO STOPPING CENTER," in August 1982. *Id.*

11. *Id.* PSC uses the colors green, white, and red-orange in its mark. *Id.* at 94.

12. *Id.* at 90; *see supra* note 3 (describing the prerequisites to obtaining incontestable status under the Lanham Act).

13. *Petro Stopping Ctrs.*, 130 F.3d at 91.

14. *Id.* The CFN is a network of facilities that employ the "card lock" fueling system. *Id.* A card from JRP will work at other CFN member stations and vice versa. *Id.*

15. *Id.* Although there were no other services available at JRP fueling stations, one station was located near a convenience store and another near a restaurant. *Id.* However, both the store and the restaurant were independently owned and had no affiliation with JRP. *Id.*

16. *Id.* at 91, 95.

17. *Id.* at 91. JRP ran advertisements directed specifically towards commercial customers in local trade newsletters and CFN directories. *Id.* JRP did not use radio advertisements, billboards or Virginia Department of Transportation signs for advertising. *Id.* at 91, 95.

18. *Id.* at 91. JRP used either white or gray for its background and had "JR" in large red letters. *Id.* Next to the "JR" is "James River" in blue letters and below that is "PETRO CARD" in slanted red letters designed to create an impression of movement. *Id.*

19. *Id.*

20. *Id.* at 90. PSC also alleged federal and common law unfair competition, federal dilution, and Virginia false advertising claims. *Id.* All of these claims were resolved in favor of JRP in the district court and were not addressed on appeal. *Id.*

JRP on all counts, concluding that PSC's trademarks were "merely descriptive" and "fairly weak" and that no "likelihood of confusion" existed between the two marks.²¹ PSC appealed the district court's decision.²²

2. *Legal Background.*—

a. *Trademark Registration.*—The law of trademarks "establishes exclusive rights to use marks that distinguish one manufacturer, merchant or service provider's goods or services from those of others."²³ Trademarks can consist of a single word or a group of words or of "any device that serves to distinguish goods or services," such as "color patterns, scents, packaging, even a good's nonfunctional design."²⁴ A trademark may be registered by its owner in the Patent and Trademark Office (PTO); this may be accomplished in a few, relatively easy, steps.²⁵ When an applicant attempts to register a

21. *Id.*; *Petro Stopping Ctrs., L.P. v. James River Petroleum, Inc.*, 41 U.S.P.Q.2d (BNA) 1853, 1855-56 (E.D. Va.), *aff'd*, 130 F.3d 88 (4th Cir. 1997), *cert. denied*, 118 S. Ct. 1561 (1998).

22. *Petro Stopping Ctrs.*, 130 F.3d at 91.

23. DONALD S. CHISUM & MICHAEL A. JACOBS, UNDERSTANDING INTELLECTUAL PROPERTY LAW § 5A, at 7 (1997).

24. *Id.*; see *Qualitex Co. v. Jacobson Prods. Co.*, 514 U.S. 158, 159 (1995) (holding "that there is no rule absolutely barring the use of color alone"); *In re Clarke*, 17 U.S.P.Q.2d (BNA) 1238, 1239 (T.T.A.B. 1990) (stating that there is no "reason why a fragrance is not capable of serving as a trademark to identify or distinguish a certain type of product"); *In re General Elec. Broad. Co.*, 199 U.S.P.Q. (BNA) 560, 563 (T.T.A.B. 1978) (stating that in certain instances when sounds are distinguishable and create an association with a specific product they can be valid trademarks).

25. The applicant must fill out an application with the PTO listing (1) the name of the applicant, (2) the first date that the trademark was used, (3) a description of the goods or services that the trademark is used to represent, and (4) a claim of ownership of the trademark being submitted by the applicant. 15 U.S.C. § 1051(a) (1994). Along with the application, the applicant must submit a copy of the trademark being registered. *Id.* After the application is filed, an examiner at the PTO reviews it. If the examiner feels that the trademark does not adequately identify or distinguish the goods or services of the applicant from other trademark holders, or if it violates any of the prohibitions of 15 U.S.C. § 1052 (defining which marks can and cannot be registered on the principal register), she will deny the application. 1 JEROME GILSON & ANNE GILSON LALONDE, TRADEMARK PROTECTION AND PRACTICE § 3.04[1], at 82-82.1 (1998). If the application is approved, then the trademark is published in the Official Gazette, a PTO publication. 15 U.S.C. § 1062. After publication in the Official Gazette, members of the public have thirty days to file an "opposition" with the PTO if they feel that they will be "damaged" (i.e., the new trademark will infringe on their existing mark) by the trademark. 15 U.S.C. § 1063. If no one files an opposition proceeding, then the trademark is registered, and the owner receives a certificate of registration. 15 U.S.C. § 1057. Each registered trademark must be renewed every ten years after its issuance to maintain the protections of federal registration; renewal may occur so long as the trademark is being used in the sale of goods in commerce. 15 U.S.C. § 1059.

trademark with the PTO, it must essentially meet four criteria before a registration will issue: (1) the mark must be a trademark,²⁶ service mark,²⁷ collective mark,²⁸ or a certification mark;²⁹ (2) the mark must be a “device” used to “distinguish goods and services”; (3) the mark must be “distinctive”; and (4) the mark cannot be so similar to another mark that has been previously used or registered as to cause confusion.³⁰ Several statutory bars exist to block registration; the most important, for the purposes of this note, is the mark being “merely descriptive.”³¹

The ability of a mark to “distinguish” itself is often referred to as its “strength” or its ability to “identify the goods sold under the mark as emanating from a particular, although possibly anonymous, source.”³² For purposes of determining registrability, trademarks are generally classified into one of four categories:³³ (1) “generic” trade-

26. See 15 U.S.C. § 1127 (defining trademark as “any word, name, symbol, or device, or any combination thereof . . . used by a person, or . . . which a person has a bona fide intention to use in commerce . . . to identify and distinguish his or her goods” from others in commerce).

27. See *id.* (defining service mark as “any word, name, symbol, or device, or any combination thereof . . . used by a person, or . . . which a person has a bona fide intention to use in commerce . . . to identify and distinguish the services of one person” from the services of others in commerce).

28. See *id.* (defining collective mark as “a trademark or service mark . . . used by the members of a cooperative, an association, or other collective group or organization” or intended to be used by the group or organization).

29. See *id.* (defining certification mark as “any word, name, symbol, or device, or any combination thereof . . . used by a person other than its owner, or . . . which its owner has a bona fide intention to permit a person other than its owner to use in commerce”).

30. See *CHISUM & JACOBS*, *supra* note 23, § 5C, at 12; see also 15 U.S.C. § 1052 (setting forth the statutory requirements and bars to trademark registration); 1 *GILSON & LALONDE*, *supra* note 25, § 1.02[1][c], at 11 (stating that a “trademark must meet three fundamental requirements” for registrability: (1) “it must consist of a word, name, symbol, device, or any combination thereof” which will qualify as a valid trademark, (2) “it must be adopted and used by a manufacturer or merchant or qualify for intent to use treatment,” and (3) “it must identify [the mark holder’s] goods and distinguish them from those manufactured or sold by others”).

31. 15 U.S.C. § 1052(e)(1). Other statutory bars include: when the mark is comprised of “immoral, deceptive, or scandalous matter”; when the mark is “deceptively misdescriptive” of the goods to be sold; and when the mark is “primarily geographically descriptive” or is “primarily geographically deceptively misdescriptive” of the goods being sold, or is “primarily a surname.” 15 U.S.C. § 1052(a), (e).

32. *McGregor-Doniger, Inc. v. Drizzle, Inc.*, 599 F.2d 1126, 1131 (2d Cir. 1979) (citing *E.I. Dupont de Nemours & Co. v. Yoshida Int’l, Inc.*, 393 F. Supp. 502, 512 (E.D.N.Y. 1975); 3 *RUDOLPH CALLMAN, THE LAW OF UNFAIR COMPETITION, TRADEMARKS AND MONOPOLIES* § 82.1(1), at 755 (3d ed. 1969)).

33. See *Abercrombie & Fitch Co. v. Hunting World, Inc.*, 537 F.2d 4, 9-11 (2d Cir. 1976) (identifying the four categories of terms with respect to trademark protection). The strength or distinctiveness of a mark determines not only “the ease with which it may be established as a valid trademark,” but also “the degree of protection it will be accorded.”

marks, which receive no protection;³⁴ (2) "descriptive" trademarks,³⁵ which obtain no protection unless the registrant can show that the trademark has "become distinctive of the applicant's goods in commerce," i.e., acquired a "secondary meaning";³⁶ (3) "suggestive" trademarks, which are registerable but are only entitled to narrow or "weak" protection;³⁷ and (4) "arbitrary" or "fanciful" trademarks, which receive broad or "strong" protection.³⁸ Therefore, when a party wants to oppose the registration of a trademark, or to declare it invalid, it must show that the mark is either generic or descriptive (with no secondary meaning).³⁹

McGregor-Doniger, 599 F.2d at 1131; see *infra* notes 78-79 and accompanying text (discussing the role of a mark's distinctiveness in the infringement analysis).

34. See *Abercrombie & Fitch*, 537 F.2d at 9 (defining a "generic" term as "one that refers, or has come to be understood as referring, to the genus of which the particular product is a species"); e.g., *Kellogg Co. v. National Biscuit Co.*, 305 U.S. 111, 116 (1938) (holding that the term "Shredded Wheat" as a trademark could give no exclusive rights because it is the generic term for the product).

35. See 1 GILSON & LALONDE, *supra* note 25, § 2.03, at 59-60 (defining a "descriptive" term as one that "informs the purchasing public of the characteristics, quality, functions, uses, ingredients, components, or other properties of a product, or conveys comparable information about a service," and citing an example of a merely descriptive term as "Speedy" for a delivery service).

36. See *International Kennel Club of Chicago, Inc. v. Mighty Star, Inc.*, 846 F.2d 1079, 1085 (7th Cir. 1988) (stating that even if a term's "'primary' meaning is merely descriptive, if through use the public has come to identify the term with [a specific] product or service, the words have acquired 'secondary meaning' and would become a protectable trademark"); see also CHISUM & JACOBS, *supra* note 23, § 5C, at 12 ("Descriptive . . . marks are presumptively nondistinctive, but the mark user may overcome the presumption by a showing that the mark has acquired secondary meaning, i.e., has through use become distinctive of the goods of services."); F.T. Alexandra Mahaney, *Incontestability: The Park 'N Fly Decision*, 33 UCLA L. REV. 1149, 1160 (1986) ("The doctrine of secondary meaning recognizes that a mark that is incapable of inherent distinctiveness because of its descriptiveness might nevertheless have been used so long and so exclusively by one producer in connection with one product that the mark has come to identify that product alone." (citing *G. & C. Merriam Co. v. Saalfeld*, 198 F. 369, 373 (6th Cir. 1912))).

37. See *Abercrombie & Fitch*, 537 F.2d at 11 (noting that "[a] term is suggestive if it requires imagination, thought and perception to reach a conclusion as to the nature of the goods" (internal quotation marks omitted) (quoting *Stix Prods., Inc. v. United Merchants & Mfrs., Inc.*, 295 F. Supp. 479, 488 (S.D.N.Y. 1968))); *Union Carbide Corp. v. Ever-Ready, Inc.*, 531 F.2d 366, 379-80 (7th Cir. 1976) (stating that "EVEREADY" is not descriptive, but suggestive because it "suggests the quality of long life").

38. See CHISUM & JACOBS, *supra* note 23, § 5C[3], at 60 n.218 (stating that "[a] fanciful term is one invented solely for use as a trademark, for example 'EXXON' for petroleum services" and "[a]n arbitrary term is a common word used in an unfamiliar way, for example 'APPLE' for computers"); 1 GILSON & LALONDE, *supra* note 25, § 1.02[1][c], at 11-12 (defining arbitrary and fanciful marks as those "having no inherent meaning in relation to the product or service").

39. A trademark can be challenged anytime after its registration (and before it becomes incontestable) on the basis that it is generic or merely descriptive because "the Lanham Act gives the courts broad authority to review the PTO's registration decisions and

An application to register a trademark may be opposed by “[a]ny person who believes that he would be damaged by the registration of a mark upon the principal register.”⁴⁰ An opposition may be brought for any reason in which a mark may be denied by the PTO listed in 15 U.S.C. § 1052, such as the mark is “merely descriptive” or is likely to cause confusion with an existing mark.⁴¹

b. Trademark Infringement.—The common law of trademarks and the rationale underlying the Lanham Act derive from a basic policy designed to “prevent others from using the same or similar marks that create a likelihood of confusion . . . as to the origin or sponsorship of goods or services.”⁴² With the goal of preventing consumer confusion, trademark law serves four vital functions in commercial law. First, “it identifies one seller’s product and distinguishes a product from similar products sold by others.”⁴³ Second, “it signifies that all goods bearing the same trademark come from a single source.”⁴⁴ Third, “it signifies that all goods bearing the same trademark are of equal quality.”⁴⁵ Finally, “it is a prime instrument in the advertisement and sale of goods.”⁴⁶

“Trademark law fosters these functions by balancing four interests” to equally serve the consuming public, the trademark owner, and those who want to compete freely in an open market.⁴⁷ The first interest is to prevent consumers from being confused about the “origin or sponsorship” of merchandise, goods, or services.⁴⁸ The second in-

to allow or cancel registrations.” Mahaney, *supra* note 36, at 1157 (citing 15 U.S.C. § 1119 (1982)).

40. 15 U.S.C. § 1063 (1994).

41. See CHISUM & JACOBS, *supra* note 23, § 5D, at 142 (stating that “[g]rounds for opposition are the same as those for registration denial under Lanham Act Section 2, including descriptiveness and confusing similarity to marks previously used by others”); see also *supra* notes 25-31 and accompanying text (discussing the requirements for trademark registration and some of the statutory bars to registration listed in 15 U.S.C. § 1052).

42. CHISUM & JACOBS, *supra* note 23, § 5A, at 8.

43. Mahaney, *supra* note 36, at 1151.

44. *Id.*

45. *Id.* at 1151-52.

46. *Id.* at 1152; see also CHISUM & JACOBS, *supra* note 23, § 5A, at 8 (stating that the four functions of trademarks are to: (1) “identify the goods or services to consumers”; (2) “identify the source of the goods and services and serve as a badge of their quality”; (3) provide “consumers [with] a frame of reference regarding quality by informing them of a product manufacturer’s identity”; and (4) serve as “advertising devices”).

47. See CHISUM & JACOBS, *supra* note 23, § 5A, at 8.

48. *Id.* If marks are similar, they may confuse consumers, causing them to purchase one merchant’s goods when they were intending to purchase another merchant’s goods. *Id.* This would deprive the consumers of “free choice” in choosing the products that they want to purchase, regardless of the products’ quality. *Id.*

terest is in preserving and protecting the "goodwill" of the mark's owner in the community among consumers.⁴⁹ The third interest is the common interest of free competition, which serves both the consumers and new competitors who want to enter into a particular enterprise.⁵⁰ The final competing interest is a general desire for a "fair and efficient legal system" that will serve both the consumers and competitors equally.⁵¹

The balance between these competing interests is served by one's opportunity to bring an infringement action. An injunction in an infringement action is allowed when the litigant bringing the action can show that the registered mark is "likely . . . to cause confusion."⁵² If a mark is permitted to cause confusion as to the origin of the goods in commerce, it will run afoul of the first two competing interests mentioned above, the prevention of confusion as to the origin of goods and preserving the goodwill of a mark holder in commerce.⁵³ Therefore, courts protect these interests via infringement suits. Additionally, the third and fourth interests are also preserved by courts presiding over infringement actions.⁵⁴ Courts ensure the fair and consistent application of trademark law, allowing the continuance of free trade and commerce among competitors in the market, which prevents "[e]xcessive trademark protection [which] restricts market entry, limiting customer choice and raising prices."⁵⁵ Therefore, infringement actions promote the balancing of the competing interests in trademark law.

The Lanham Act states that a person "infringes" a trademark when that person uses "in commerce any reproduction, counterfeit, copy, or colorable imitation of a registered mark" for the purpose of selling, distributing or advertising "any goods or services on or in connection with which such use is likely to cause confusion, or to cause

49. *Id.* Any incentives that a trademark holder would have in establishing "goodwill" with his customers, by providing consistent quality in his goods, would be lost if any competitor could freely take advantage of that "goodwill" through use of similar marks. *Id.*

50. *Id.* By granting "excessive trademark protection" the choices that consumers have would be reduced and the prices of those products that are available could be priced higher. *Id.*

51. *Id.* If the doctrines of trademark law are "vague or subject to inconsistent application," it will increase the burden on judicial resources, promote litigation, and increase the costs of conducting business. *Id.*

52. 15 U.S.C. § 1052(d) (1994).

53. *See supra* notes 47-51 and accompanying text (describing various interests weighed by trademark law).

54. *See supra* notes 47-51 and accompanying text (discussing the interest of free competition, and the desire for fairness and efficiency in the legal system).

55. CHISUM & JACOBS, *supra* note 23, § 5A, at 8.

mistake, or to deceive," without the registrant's consent.⁵⁶ "In determining infringement, it is not necessary to prove actual confusion[,] rather "[t]he test is whether there is likelihood of confusion."⁵⁷

The judicially created two part test for infringement was explained in *Quality Inns International, Inc. v. McDonald's Corp.*⁵⁸ In that case, Quality Inns International, Inc. sought a declaratory judgment against McDonald's Corp., declaring that the trademark "McSleep Inn" for an economy class hotel chain did not infringe any of McDonald's federally registered marks.⁵⁹ In denying Quality Inn's declaratory judgment Judge Niemeyer stated that:

[t]here are but two inchoative elements that must be established for entitlement [of a claim of infringement], from which all permutations and guises of the cause of action are derived: the senior owner of the mark must demonstrate (1) the adoption and use of a mark and his entitlement to enforce it, and (2) the adoption and use by a junior user of a mark that is likely to cause confusion that goods or services emanate from the senior owner.⁶⁰

Using this two-step analysis, the Fourth Circuit stated its test for infringement in the case of *Lone Star Steakhouse & Saloon, Inc. v. Alpha of Virginia, Inc.*⁶¹ In that case, the Fourth Circuit affirmed the lower court's ruling granting the plaintiff (Lone Star Steakhouse) a permanent injunction against Alpha of Virginia on the basis of trademark infringement.⁶² The plaintiff had federal registration for the trademarks "Lone Star Steakhouse & Saloon" and "Lone Star Cafe," and was seeking to enjoin the defendant's use of "Lone Star Grill."⁶³ To determine the test for infringement, the court looked to 15 U.S.C. § 1114(1) and stated that "a complainant must demonstrate that it has a valid, protectible trademark and that the defendant's use of a colorable imitation of the trademark is likely to cause confusion among consumers."⁶⁴ The court agreed with the lower court's analysis in

56. 15 U.S.C. § 1114(1)(a).

57. *Dwight S. Williams Co. v. Lykens Hosiery Mills, Inc.*, 233 F.2d 398, 401 (4th Cir. 1956) (citing *Noll v. Rinex Labs. Co.*, 25 F. Supp. 239, 240 (N.D. Ohio 1935); *Mershon Co. v. Pachmayr*, 220 F.2d 879, 883-84 (9th Cir. 1955)).

58. 695 F. Supp. 198 (D. Md. 1988).

59. *Id.* at 201.

60. *Id.* at 209 (citing *Yale Elec. Corp. v. Robertson*, 26 F.2d 972 (2d Cir. 1928)).

61. 43 F.3d 922 (4th Cir. 1995).

62. *Id.* at 925.

63. *Id.* at 925-26.

64. *Id.* at 930.

finding infringement by the defendant and with its decision to grant an injunction in favor of Lone Star Steakhouse & Saloon.⁶⁵

In the Fourth Circuit, the modern test for determining whether a likelihood of confusion exists began to develop in *Pizzeria Uno Corp. v. Temple*.⁶⁶ In this case, the plaintiff, Pizzeria Uno Corp., registered the mark "Pizzeria Uno" in 1978 for a restaurant in Chicago, Illinois.⁶⁷ The plaintiff began to sell franchises, and the chain of restaurants grew to eleven.⁶⁸ The defendant operated restaurants in South Carolina under the trademark "Taco Uno."⁶⁹ The defendant attempted to register the "Taco Uno" mark in 1982 and the PTO rejected the first application.⁷⁰ The defendant petitioned the PTO for reconsideration and the PTO then published the mark in the Official Gazette.⁷¹ After viewing the defendant's mark in the Official Gazette, the plaintiff filed a complaint alleging, *inter alia*, federal trademark infringement.⁷² The district court held that there was no infringement, finding that the term "UNO" was weak and "merely descriptive," the operations of the two companies were not similar, the restaurant operations were not located near each other, the advertising campaigns were different, there was no intentional infringement, and there was no evidence of actual confusion.⁷³

The district court relied on the Fifth Circuit's decision in *Sun-Fun Products, Inc. v. Sontan Research & Development, Inc.*⁷⁴ to define the factors to be employed when determining if a likelihood of confusion exists.⁷⁵ The factors, which the Fourth Circuit adopted, were:

- a) the strength or distinctiveness of the mark;
- b) the similarity of the two marks;

65. *Id.* at 937, 941.

66. 747 F.2d 1522 (4th Cir. 1984).

67. *Id.* at 1525.

68. *Id.*

69. *Id.* The court noted that the plaintiff, Pizzeria Uno, was not operating any franchises in South Carolina, but was investigating the possibility of expansion into that state. *Id.*

70. *Id.* The PTO rejected the mark "on the basis of [the registration] for the mark Pizzeria Uno." *Id.*

71. *Id.*; see *supra* note 25 (explaining the process by which a trademark is registered).

72. *Pizzeria Uno*, 747 F.2d at 1524-25. In addition to the federal infringement claim, Pizzeria Uno brought a state common law unfair competition action. *Id.* at 1524. Prior to filing the action in federal court, Pizzeria Uno filed an opposition application with the PTO. *Id.* at 1525-26. The PTO ordered a hearing on the opposition, but deferred the hearing pending the outcome of the infringement action in federal court. *Id.*

73. *Pizzeria Uno Corp. v. Temple*, 566 F. Supp. 385, 396-99 (D.S.C. 1983), *aff'd*, 747 F.2d 1522 (4th Cir. 1984).

74. 656 F.2d 186 (5th Cir. 1981).

75. *Pizzeria Uno*, 747 F.2d at 1527.

- c) the similarity of the goods/services the marks identify;
- d) the similarity of the facilities the two parties use in their businesses;
- e) the similarity of the advertising used by the two parties;
- f) the defendant's intent;
- g) actual confusion.⁷⁶

The Fourth Circuit cautioned that not all of the factors carry equal weight or are relevant in every analysis.⁷⁷ However, the court did emphasize that the "first and paramount factor under this set of factors is the distinctiveness or strength of the two marks."⁷⁸ Similarly, the majority of the circuits consider the "strength" of the mark factor when determining if a likelihood of confusion exists.⁷⁹

76. *Id.*

77. *Id.* (stating that "[n]ot all these [factors] are always relevant or equally emphasized in each case" (alterations in original) (quoting *Modular Cinemas of Am., Inc. v. Mini Cinemas Corp.*, 348 F. Supp. 578, 582 (S.D.N.Y. 1972))).

78. *Id.* In addition to developing the seven-factor test for the likelihood of confusion analysis, the Fourth Circuit also defined the standard for appellate review to be applied in reviewing the district court's findings in trademark cases. *Id.* at 1526. The court adopted the "clearly erroneous rule" and stated:

[A] finding is clearly erroneous when there is no evidence in the record supportive of it and also, when, even though there is some evidence to support the finding, the reviewing court, on review of the record, is left with a definite and firm conviction that a mistake has been made in the finding.

Id. (citing *United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1948); *Friend v. Leidinger*, 588 F.2d 61, 64 (4th Cir. 1978); *Phillips v. Crown Cent. Petroleum Corp.*, 556 F.2d 702, 703 (4th Cir. 1977)). Note that although the Fourth Circuit adopted the test announced by the district court and affirmed the denial of an injunction, it disagreed with the district court's conclusion that the mark was descriptive, and instead held it to be suggestive. Additionally, the Fourth Circuit rejected the district court's finding that there was no likelihood of confusion, and held instead that while there was a likelihood of confusion between the two marks, injunctive relief was not appropriate because *Pizzeria Uno* has not "penetrated" the area in which the defendant was operating. *Id.* at 1533, 1536.

79. *See Keds Corp. v. Renee Int'l Trading Corp.*, 888 F.2d 215, 222 (1st Cir. 1989) (identifying one of the eight factors as "the strength of the plaintiff's mark"); *Sno-Wizard Mfg., Inc. v. Eisemann Prods. Co.*, 791 F.2d 423, 428 (5th Cir. 1986) (stating that one of the seven factors to be considered is the "type (i.e., strength) of [the] trademark or trade dress"); *Frish's Restaurants, Inc. v. Elby's Big Boy*, 670 F.2d 642, 648 (6th Cir. 1982) (noting that the "strength of the plaintiff's mark" is one of the eight factors to be considered); *Squirtco v. Seven-Up Co.*, 628 F.2d 1086, 1091 (8th Cir. 1980) (recognizing that the strength of a trademark is one of numerous factors examined to determine whether there is a likelihood of confusion); *AMF Inc. v. Sleekcraft Boats*, 599 F.2d 341, 348-49 (9th Cir. 1979) (noting that the "strength of the mark" is one of eight factors to be considered); *Scott Paper Co. v. Scott's Liquid Gold, Inc.*, 589 F.2d 1225, 1229 (3d Cir. 1978) (stating that one of the ten factors to be considered is "the strength of [the] owner's mark"); *Helene Curtis Indus., Inc. v. Church & Dwight Co.*, 560 F.2d 1325, 1330 (7th Cir. 1977) (indicating that "the strength of the complainant's mark" is one of the seven factors to be considered); *Polaroid Corp. v. Polarad Elecs. Corp.*, 287 F.2d 492, 495 (2d Cir. 1961) (stating that one of the eight factors to be used is the "strength of [the plaintiff's] mark").

c. *The Doctrine of Incontestability.*—The introduction of the Lanham Act⁸⁰ was important to trademark law in many respects; one of the Act's most important new provisions was the doctrine of "incontestability."⁸¹ Incontestability status is obtained for a trademark by meeting the following requirements: the trademark must have been in use for five consecutive years; the trademark registered may not be the "generic"⁸² name for the goods and services the mark is being used in connection with; and the owner of the mark must provide a written affidavit to the PTO within one year after the five years continuous use has elapsed.⁸³ The owner's affidavit must state the goods and services that the trademark has been used in connection with for the continuous five year period, that there has been "no final decision adverse to the registrant's claim of ownership" of the mark, and that there is no current proceeding involving the rights of the trademark.⁸⁴ Once the PTO determines that these requirements are met, the trademark becomes incontestable, and its registration "shall be conclusive evidence of the validity of the registered mark and of the registration of the mark, of the registrant's ownership of the mark, and of the registrant's exclusive right to use the registered mark in commerce."⁸⁵ This right of exclusive use is subject to a number of defenses that may be proven by an alleged infringer to overcome the incontestable status of a mark.⁸⁶

80. 15 U.S.C. §§ 1051-1127 (1994).

81. See Mahaney, *supra* note 36, at 1154 ("One of the most important statutory advantages of the Lanham Act is the doctrine of incontestability."); see also CHISUM & JACOBS, *supra* note 23, § 5E[1] at 168 ("The Lanham Act's incontestability provision . . . was an innovation.").

82. See *supra* note 34 and accompanying text (defining and providing an example of a "generic" mark).

83. 15 U.S.C. § 1065.

84. *Id.*

85. *Id.* § 1115(b).

86. *Id.* Under 15 U.S.C. § 1115(b), the incontestable status of a mark is subject to the following defenses: "the registration or the incontestable right to use the mark was obtained fraudulently"; "the mark has been abandoned by the registrant"; the mark is being used by or with the permission of the owner to misrepresent the source of goods or services that the mark is used on or in connection with; the mark being charged as an infringement is used "otherwise than as a mark, of the party's individual name in his own business, . . . or of a [mark] which is descriptive of and used fairly and in good faith only to describe the goods of such party, or their geographic origin"; "prior use" of the registered mark by the alleged infringer, without the knowledge of the senior mark (note that this defense is only applicable to the party who is charged with the specific infringement, and does not bar an infringement action being brought against others who can not use this defense); the mark was previously registered and used by the alleged infringer; "the mark has been or is being used to violate the antitrust laws of the United States"; or "equitable principles, including laches, estoppel, and acquiescence, are applicable." *Id.* Additionally, by reference, 15 U.S.C. § 1115(b) allows defenses from § 1065, which are: "no incontestable right shall be

However, since the Lanham Act was passed in 1946, many courts have had difficulty defining the scope of protection to be accorded to incontestable marks.⁸⁷ One of the main questions was whether a mark that has attained incontestable status under 15 U.S.C. § 1065 could be declared invalid in an infringement action brought by the owner of the incontestable mark on the grounds that the mark was merely descriptive with no secondary meaning.⁸⁸ This split in the interpretation of the impact of incontestability is best evidenced in the cases of *Park 'N Fly, Inc. v. Dollar Park & Fly, Inc.*,⁸⁹ a Ninth Circuit case, and *Union Carbide Corp. v. Ever-Ready Inc.*,⁹⁰ a Seventh Circuit decision. This split in the case law related to whether the incontestable status of a "merely descriptive" trademark could be used "offensively,"⁹¹ in addition to its "defensive"⁹² use.

In *Union Carbide Corp.*, the Seventh Circuit determined that even though a mark was "merely descriptive," with no secondary meaning,

acquired in a mark which is the generic name for the goods or services or a portion thereof, for which it is registered," and that an incontestable mark will not be superior to a "valid right acquired under the law of any State or Territory by use of a mark or trade name continuing from a date prior to the date of [federal] registration" of the incontestable mark. *Id.* § 1065.

87. See Mahaney, *supra* note 36, at 1149 ("Since the passage of the [Lanham] Act, federal courts have wrestled with the meaning of incontestability.").

88. See 1 GILSON & LALONDE, *supra* note 25, § 4.03[3][C], at 52-53 (noting that a "conflict [existed] between the Ninth and Seventh Circuit on a fundamental question of Lanham Act interpretation"). Compare *Park 'N Fly, Inc. v. Dollar Park & Fly, Inc.*, 718 F.2d 327, 331 (9th Cir. 1983) (stating that in the Ninth Circuit "a registrant can use the incontestable status of its mark defensively, as a shield to protect its mark against cancellation and to protect its right to continued use of the mark, but not offensively, as a sword to enjoin another's use") with *Union Carbide Corp. v. Ever-Ready Inc.*, 531 F.2d 366, 377 (7th Cir. 1976) (holding that "a plaintiff in an infringement action establishes conclusively, under § 1115(b), his exclusive right to use a trademark to the extent he shows his trademark has become incontestable under § 1065" and that there is no distinction between "defensive/offensive" use of a mark's incontestable status).

89. 718 F.2d 327 (9th Cir. 1983).

90. 531 F.2d 366 (7th Cir. 1976).

91. "Offensive" use of an incontestable trademark is analogous to using the incontestability of the "merely descriptive" mark as a "sword to enjoin another's use." *Park 'N Fly*, 718 F.2d at 331. This use would allow the holder of an incontestable, "merely descriptive" mark to enjoin the use of an infringing mark. If the mark was not incontestable, it would not be able to enjoin the use, because of its "merely descriptive" strength. *Id.*

92. "Defensive" use of an incontestable trademark allows a registrant of a mark which is "merely descriptive" (and normally not entitled to protection) to use its incontestable status as a "shield to protect its mark against cancellation and to protect its right to continued use of the mark." *Id.* "If an incontestable mark becomes generic, it may be canceled pursuant to 15 U.S.C. § 1064(c), but an incontestable mark cannot be challenged for being 'merely descriptive.'" *Id.* at 330 (citing *Abercrombie & Fitch Co. v. Hunting World, Inc.*, 537 F.2d 4, 12-13 (2d Cir. 1976); *Park 'N Fly, Inc. v. Park & Fly, Inc.*, 489 F. Supp. 422, 424 (D. Mass. 1979)).

"offensive" use of the mark's incontestable status was allowed.⁹³ The plaintiff, Union Carbide, had the mark "EVEREADY," which had long gained incontestable status,⁹⁴ and brought an infringement action against the defendant, Ever-Ready Inc., which was in similar business operations under the mark "Ever-Ready."⁹⁵ The defendant argued that "incontestability is a narrow defense device which cannot be used offensively by a plaintiff in an infringement action."⁹⁶ After careful review of the statutory materials and the case law, the Seventh Circuit concluded that "[t]here is no defensive/offensive distinction in the [Lanham Act], and . . . one should [not] be judicially engrafted on it."⁹⁷

However, in *Park 'N Fly*, the Ninth Circuit held exactly the opposite, stating that a plaintiff with a "merely descriptive" but incontestable mark could not enjoin the use of an infringing mark.⁹⁸ The plaintiff, Park 'N Fly, Inc.,⁹⁹ brought an infringement action against Dollar Park & Fly, Inc.¹⁰⁰ While rejecting Dollar Park & Fly's argument that the mark "Park 'N Fly" was generic (and therefore entitled to no protection), the Ninth Circuit did agree that since the "Park 'N Fly" mark was "merely descriptive" with no secondary meaning, Park 'N Fly, Inc. was not allowed to use incontestability as an offensive weapon and enjoin the defendant's use.¹⁰¹ This controversy was resolved by the Supreme Court in *Park 'N Fly, Inc. v. Dollar Park & Fly, Inc.*¹⁰²

In *Park 'N Fly*, the Supreme Court held that an infringement action brought by the owner of an incontestable mark may not be de-

93. *Union Carbide*, 531 F.2d at 377.

94. The mark "EVEREADY" was registered and used for "electric batteries, flashlights, and miniature [light] bulbs," and was in continuous use since 1901. *Id.* at 370.

95. Ever-Ready Inc. imported and distributed light bulbs and other electrical items under the mark "Ever-Ready," but had only been in operation since 1946. *Id.* at 370-71.

96. *Id.* at 373.

97. *Id.* at 377.

98. *Park 'N Fly, Inc. v. Dollar Park & Fly, Inc.*, 718 F.2d 327, 331 (9th Cir. 1983).

99. Park 'N Fly, Inc. had been in business since 1967, and has operated a number of automobile parking lots near airports in various cities throughout the United States. The company's mark, "Park 'N Fly" (with an airplane logo), received incontestable status from the PTO in 1977. *Id.* at 329-30.

100. *Id.* at 329. Dollar Park & Fly, Inc. had entered into the same business as the plaintiff in 1973, and only operated one facility in Portland, Oregon, where the plaintiff had no business. *Id.* at 329.

101. *Id.* at 330-31. The court reversed the district court's determination that Park 'N Fly, Inc. was entitled to an injunction against the defendant and expressly disregarded the Seventh Circuit decision in *Union Carbide* by holding that incontestability of a "merely descriptive" mark can only be used "defensively" and not "offensively." *Id.* at 331.

102. 469 U.S. 189 (1985).

fended on the ground that the mark is merely descriptive and therefore invalid.¹⁰³ In so holding, the Court focused on the plain language of the Lanham Act, stating that because a registrant has an “‘exclusive right’ to use the mark [the] incontestable status may be used to enjoin infringement by others.”¹⁰⁴ The court further noted that “Congress expressly provided in [section] 33(b) [15 U.S.C. § 1114(b)] and 15 [15 U.S.C. § 1065] that an incontestable mark could be challenged on specified grounds, and the grounds identified by Congress do not include mere descriptiveness.”¹⁰⁵ The Court did note that any possibility of merely descriptive language being taken from the “public domain” as a consequence of its holding is mitigated by the existence of the PTO’s examination procedure and the opportunity for third parties to contest the registration of any mark for the five years prior to a mark becoming incontestable.¹⁰⁶

Confusion still exists, however, with regard to the effect of incontestability on the “likelihood of confusion” analysis, which is the second element of a cause of action for infringement.¹⁰⁷ Some courts have held that a trademark’s incontestable status dictates that the mark be considered “strong” for purposes of the likelihood of confusion analysis. Both *Dieter v. B & H Industries, Inc.*,¹⁰⁸ in the Eleventh Circuit, and *Wynn Oil Co. v. Thomas*,¹⁰⁹ in the Sixth Circuit, interpreted the Supreme Court’s holding in *Park ‘N Fly* to mean that incontestable trademarks are to be considered “strong” when determining if a likelihood of confusion exists.¹¹⁰

However, the majority of circuits have held that incontestability goes only to a trademark’s validity and gives no weight to incontestability in assessing a mark’s strength when determining if a likelihood

103. *Id.* at 205 (concluding “that the holder of a registered mark may rely on incontestability to enjoin infringement and that such an action may not be defended on the grounds that the mark is merely descriptive”).

104. *Id.* at 196.

105. *Id.* at 201.

106. *Id.*

107. See CHISUM & JACOBS, *supra* note 23, § 5E[1][b], at 171.

108. 880 F.2d 322 (11th Cir. 1989).

109. 839 F.2d 1183 (6th Cir. 1988).

110. See *Dieter*, 880 F.2d at 328-29 (reviewing the *Park ‘N Fly* decision and Eleventh Circuit case law and concluding that when a “mark is incontestable, then it is presumed to be at least descriptive with secondary meaning, and therefore a relatively strong mark”); *Wynn Oil Co.*, 839 F.2d at 1187 (stating that “*Park ‘N Fly* [] require[s] that courts give full effect to incontestable trademarks” and “[t]herefore, while the strength of the plaintiffs’ mark will still be at issue in cases involving contestable marks, once a mark has been registered for five years, the mark must be considered strong and worthy of full protection”).

of confusion exists.¹¹¹ Therefore, in most circuits incontestability will have no effect on a likelihood of confusion analysis; a defendant in an infringement action will not be precluded from proving the plaintiff's mark to be a weak mark and entitled to little or no protection.¹¹² This majority view of the effect of incontestability can even be seen in the opinions of district court judges in the Sixth Circuit, which has adopted the minority view, as judges are "finding ways to de-emphasize and diffuse [the] presumption" that incontestability will make a weak mark strong.¹¹³

The Fourth Circuit first considered this issue in *Lone Star Steakhouse & Saloon, Inc. v. Alpha of Virginia, Inc.*¹¹⁴ In *Lone Star*, the Fourth Circuit reversed the district court's decision pertaining to plaintiff Max Shayne,¹¹⁵ a New York corporation operating the Lone Star Cafe Roadhouse, on the basis that it "erroneously relied on incontestability as being dispositive" on the issue of the strength of an incontestable mark.¹¹⁶ After reviewing decisions in other circuits and

111. See 1 GILSON & LALONDE, *supra* note 25, § 4.03[3][D][f], at 60 (noting that a "majority of courts are taking the . . . view . . . that a defendant is entitled to show that the plaintiff's incontestably registered mark is weak" in a likelihood of confusion analysis).

112. See, e.g., *Gruner & Jahr USA Publ'g v. Meredith Corp.*, 991 F.2d 1072, 1077 (2d Cir. 1993) (noting that it was not error for the district court to find an incontestable mark "weak" for the purposes of a likelihood of confusion analysis); *Munters Corp. v. Matsui Am., Inc.*, 909 F.2d 250, 252 (7th Cir. 1990) (concluding that "*Park 'N Fly* does not preclude consideration of a[n incontestable] mark's strength for purposes of determining the likelihood of confusion"); *Miss World (UK) Ltd. v. Mrs. America Pageants, Inc.*, 856 F.2d 1445, 1448-49 (9th Cir. 1988) (stating that incontestability of a mark "does not establish, however, that it is a particularly strong mark"); *Oreck Corp. v. U.S. Floor Sys., Inc.*, 803 F.2d 166, 171 (5th Cir. 1986) (holding that "[i]ncontestable status does not make a weak mark strong").

113. 1 GILSON & LALONDE, *supra* note 25, § 4.03[3][D][f], at 61; see *Aero-Motive Co. v. U.S. Aeromotive, Inc.*, 922 F. Supp. 29, 37 (W.D. Mich. 1996) (determining, as a Sixth Circuit district court, that the presumption of an incontestable mark being strong can "be rebutted by demonstrating that the mark, while inherently distinctive, is nevertheless not distinctive in the marketplace"); *Daddy's Junky Music Stores v. Big Daddy's Family Music Ctr.*, 913 F. Supp. 1065, 1071-72 (S.D. Ohio 1996) (suggesting the following additional factors, besides incontestability, to examine when determining if an incontestable mark is weak or strong: "determining the mark's type" (i.e. generic, descriptive, suggestive, or arbitrary/fanciful); "consider[ing] the markets in which the mark has its greatest recognition and allegiance"; and the existence of "numerous third-party registrations of the mark").

114. 43 F.3d 922 (4th Cir. 1995). In *Lone Star*, the defendant, Alpha of Virginia, Inc. (Alpha), appealed a grant of summary judgment in the district court for the plaintiff, Lone Star Steakhouse & Saloon, Inc. (Lone Star). *Id.* at 925. Lone Star brought the action claiming trademark infringement on its "Lone Star Steakhouse & Saloon" mark, which was used in connection with over thirty restaurants, claiming that Alpha's use of "Lone Star Cafe Roadhouse" caused a likelihood of confusion. *Id.* at 925-27.

115. The district court granted the plaintiff's motion for summary judgment, enjoining Alpha from using the mark "Lone Star Grill," and also granted a motion for summary judgment for the plaintiff, Max Shayne. *Id.* at 925.

116. *Id.* at 933.

the analysis of various commentators on the issue, the court stated "that incontestability affects the validity of the trademark but does not establish the likelihood of confusion necessary to warrant protection from infringement. Likelihood of consumer confusion remains an independent requirement for trademark infringement."¹¹⁷ Therefore, the court held, it was free to determine whether the incontestable mark was descriptive or suggestive in determining whether a likelihood of confusion existed.¹¹⁸

This view of incontestability was reaffirmed in *Shakespeare Co. v. Silstar Corp. of America*.¹¹⁹ In this case, Shakespeare brought a trademark infringement action against Silstar for infringing its registration of a fishing rod with a "'whitish translucent' tip."¹²⁰ In holding that the defendant did not infringe on the plaintiff's mark, the Fourth Circuit affirmed the decision of the lower court to inquire into the strength of the plaintiff's mark, even though it was incontestable.¹²¹ The court followed *Lone Star*, stating "[i]n determining the likelihood of confusion, the court may consider—indeed, should consider—the mark's strength."¹²²

3. *The Court's Reasoning.*—In *Petro Stopping Centers*, the United States Court of Appeals for the Fourth Circuit reaffirmed its position in *Lone Star* and held that the incontestability of a trademark only determines the validity of a mark in an infringement action and has no weight in defining the "strength" of a mark for the "likelihood of confusion" analysis.¹²³ Additionally, the court held that the district court's finding that no likelihood of confusion existed between the two parties' trademarks was not clearly erroneous, and therefore, PSC

117. *Id.* at 935 (citing 4A RUDOLF CALLMANN, *THE LAW OF UNFAIR COMPETITION, TRADEMARKS AND MONOPOLIES* § 25.08, at 59 (1992)).

118. *Id.*

119. 110 F.3d 234, 238-40 (4th Cir. 1997), *cert. denied*, 118 S. Ct. 688 (1998) (holding that an incontestable mark cannot be canceled because it is functional or descriptive, but that its functionality or descriptiveness should be taken into account when performing a likelihood of confusion analysis).

120. *Id.* at 236. The plaintiff, Shakespeare, owned a trademark for distinctive fishing rods called "Ugly Sticks" and brought an action against the defendant, Silstar, which manufactured similar looking fishing rods called the "Power Tip Crystal rod." *Id.* at 236-37. In this case, Silstar was not challenging Shakespeare's mark on the basis that it was "merely descriptive," but rather because the mark was "functional" and therefore weak and entitled to no federal protection. *Id.*

121. *Id.* at 239.

122. *Id.*

123. *Petro Stopping Ctrs.*, 130 F.3d at 92.

was not entitled to an injunction to prevent JRP from using its "PETRO CARD" mark.¹²⁴

To determine whether infringement had occurred, the court looked at the test defined in *Lone Star*: "[t]o prove trademark infringement, a plaintiff must show both that it has a valid, protectable trademark and that the defendant's use of a 'reproduction, counterfeit, copy, or colorable imitation,' creates a likelihood of confusion."¹²⁵ Because many of PSC's marks had attained incontestable status, the court conceded that no issue existed as to the validity of PSC's trademarks and focused only on whether a likelihood of confusion existed.¹²⁶

To determine whether a likelihood of confusion existed, the court employed the *Pizzeria Uno* seven-factor test.¹²⁷ The court reiterated that these factors do not carry "equal importance or equal relevance in every case," and that "determinations regarding likelihood of confusion" are reviewed under the clearly erroneous standard.¹²⁸

The first element of the likelihood of confusion analysis addressed by the court was the strength of PSC's mark.¹²⁹ PSC proffered three separate arguments in an attempt to show that the lower court erred in finding that PSC's "PETRO" mark was "merely descriptive and a fairly weak mark."¹³⁰ PSC argued that the Supreme Court decision in *Park 'N Fly* precluded the district court from finding PSC's mark descriptive and weak; that because the PTO found PSC's marks to be at least suggestive,¹³¹ the district court was precluded from finding PSC's marks weak; and that the fact that third-party registrations

124. *Id.* at 95.

125. *Id.* at 91 (citing 15 U.S.C. § 1114(1) (1994); *Lone Star Steakhouse & Saloon, Inc. v. Alpha of Va., Inc.*, 43 F.3d 922, 930 (4th Cir. 1995)).

126. *Id.* ("[O]nly the second requirement—likelihood of confusion—is at issue in this appeal.").

127. *Id.* at 91-92; see *supra* notes 75-79 and accompanying text (explaining the seven factor test adopted by the Fourth Circuit in *Pizzeria Uno*).

128. *Petro Stopping Ctrs.*, 130 F.3d at 91-92 (citing *Pizzeria Uno Corp. v. Temple*, 747 F.2d 1522, 1526 (4th Cir. 1984)).

129. *Id.* at 92.

130. *Id.* at 91-93 (quoting *Petro Stopping Ctrs., L.P. v. James River Petroleum, Inc.*, 41 U.S.P.Q.2d (BNA) 1853, 1855 (E.D. Va. 1997)).

131. PSC contended that since the PTO did not require PSC to show that its mark had acquired "secondary meaning" to be entitled to registration, the PTO found the mark to be at least "suggestive." *Id.* at 92. Specifically, PSC reasoned that when the PTO receives an application for a mark that is descriptive, a "secondary meaning" showing is required. Because PSC was not required to show secondary meaning, it claimed that its mark must be at least suggestive. *Id.* (citing *Lone Star Steakhouse & Saloon, Inc. v. Alpha of Va., Inc.*, 43 F.3d 922, 934 (4th Cir. 1995)).

including the word "PETRO" exist was not sufficient to declare a mark weak.¹³² The court addressed and dismissed all of these arguments.

First, the court addressed PSC's claim that *Park 'N Fly* precluded the conclusion that an incontestable mark is descriptive and weak.¹³³ The court dismissed this argument by showing that PSC misinterpreted the holding in *Park 'N Fly*.¹³⁴ The court characterized the *Park 'N Fly* decision as holding only that "a defendant in an infringement suit cannot claim that an incontestable mark is merely descriptive and therefore invalid and undeserving of any protection."¹³⁵ The court noted that the *Park 'N Fly* Court did not go as far as saying that the incontestability of a mark is dispositive of its strength when being considered in the likelihood of confusion analysis.¹³⁶ The court stated that the 1988 revisions of the Lanham Act confirmed its interpretation of *Park 'N Fly*.¹³⁷ The court also looked to its decisions in *Lone Star*, where the court held that "incontestability affects the validity of the trademark but does not establish the likelihood of confusion necessary to warrant protection from infringement,"¹³⁸ and *Shakespeare*, where it held that "although a district court cannot cancel an incontestable trademark on the grounds of functionality or descriptiveness, it can and should consider these grounds when determining whether likelihood of confusion has been established."¹³⁹

132. *Id.* at 92-93.

133. *Id.* at 92.

134. *Id.* (stating that PSC "confuses the issue of a trademark's validity with the separate inquiry into a mark's strength for purposes of the likelihood of confusion determination").

135. *Id.*

136. *Id.* ("The [Supreme] Court did not hold . . . that the descriptive nature of a mark may not be considered in the separate likelihood of confusion inquiry.").

137. *Id.* The court quoted a change in the incontestability provisions of the Lanham Act, which occurred in the Trademark Law Revision Act of 1988, which stated that "[s]uch conclusive evidence of the right to use the registered mark shall be *subject to proof of infringement*." *Id.* (alteration in original) (emphasis added) (citing Trademark Law Revision Act of 1988, Pub. L. No. 100-667, § 128(b)(1), 102 Stat. 3935, 3945 (codified at 15 U.S.C. § 1115(b))). The court felt that by making the use of an incontestable mark conditioned on any "proof of infringement," Congress was making it clear that incontestability would not affect the likelihood of confusion analysis, and therefore, not affect the determination of the strength of the mark, when determining if likelihood of confusion exists. *Id.* If Congress meant to make any incontestable mark strong as a matter of law, it would be inconsistent to make its use conditioned on "proof of infringement," as Congress was likely aware that almost every circuit uses "strength of the mark" when determining if a likelihood of confusion exists. *See supra* note 79 (listing all of the circuits that use this factor in their analysis).

138. *Id.* (internal quotation marks omitted) (quoting *Lone Star Steakhouse & Saloon, Inc. v. Alpha of Va., Inc.*, 43 F.3d 922, 935 (4th Cir. 1995)).

139. *Id.* (citing *Shakespeare Co. v. Silstar Corp. of Am.*, 110 F.3d 234, 238-40 (4th Cir. 1997), *cert. denied*, 118 S. Ct. 688 (1998)).

Secondly, PSC argued that since the PTO found the "PETRO" mark to be at least suggestive, the lower court erred in finding that the mark was descriptive and weak, because a district court should not be "free to substitute its own finding for that of the PTO."¹⁴⁰ The court addressed this argument by again citing *Pizzeria Uno* and stating that "courts should accord deference to the PTO's findings when assessing the strength of a mark under the likelihood of confusion test," but "the PTO's 'determination is not conclusive.'"¹⁴¹ The court, however, also stated that other factors besides a mark's suggestive or descriptive nature should be considered when determining the strength of a mark.¹⁴² In the instant case, these additional factors included whether the mark had acquired a secondary meaning and the extent that third parties have used the term "PETRO" in other trademarks.¹⁴³ The court agreed with the district court's findings that the term "PETRO" does not have a secondary meaning in the card lock business, in which JRP is involved, and that a large number of third-party registrants have the term "PETRO" in their trademarks.¹⁴⁴ PSC argued that "evidence of third-party registrations alone is insufficient to conclude that a mark is weak."¹⁴⁵ The court disagreed, stating that "[t]he frequency with which a term is used in other trademark registrations is indeed relevant to the distinctiveness inquiry under the first likelihood of confusion factor."¹⁴⁶

The court also noted that PSC's representations to the PTO when first trying to acquire registration for its trademarks, that the term "PETRO" is "'entitled to a very narrow scope of protection,'" was in conflict with the position PSC was taking before the Fourth Circuit regarding the strength of its "PETRO" marks.¹⁴⁷ On these grounds,

140. *Id.* at 93; see *supra* note 118 and accompanying text (noting the Fourth Circuit's similar observation in *Lone Star*).

141. *Petro Stopping Ctrs.*, 130 F.3d at 93 (quoting *Pizzeria Uno Corp. v. Temple*, 747 F.2d 1522, 1534 (4th Cir. 1984)).

142. See *id.* ("More significantly, the placement of a mark in either the suggestive or descriptive category is merely the first step in assessing the strength of a mark for purposes of the likelihood of confusion test." (citing *Lang v. Retirement Living Publ'g Co.*, 949 F.2d 576, 581 (2d Cir. 1991); *Western Publ'g Co. v. Rose Art Indus., Inc.*, 910 F.2d 57, 61 (2d Cir. 1990); *Miss World (UK) Ltd. v. Mrs. Am. Pageants, Inc.*, 856 F.2d 1445, 1449 (9th Cir. 1988))).

143. *Id.*

144. *Id.* The court noted that there are 117 third-party registrations or applications with the word "PETRO" in it, and 63 of these are related to the sale of fuel or fuel related services. *Id.*

145. *Id.*

146. *Id.* (citing *Pizzeria Uno*, 747 F.2d at 1530-31).

147. *Id.* at 94. When PSC first tried to obtain registration of its mark in 1981, the PTO objected to the mark, claiming that it would cause a "likelihood of confusion with previ-

the court upheld the district court's finding that PSC's "PETRO" mark was descriptive and weak.¹⁴⁸

The second "likelihood of confusion" factor addressed by the court was the similarity between PSC's and JRP's marks.¹⁴⁹ PSC argued that the district court erred because it focused on the dissimilarities between the marks and not the similarities.¹⁵⁰ The court dismissed this argument, stating that when considering the similarity of the marks "courts generally focus on the dominant portions of parties' marks."¹⁵¹ The court further stated that if the scrutiny of two marks was limited to only similarities, then the need to review this factor would be eliminated altogether, "[b]ecause every triable case of trademark infringement involves marks that are similar at some level."¹⁵² The court then noted that the test for similarity is whether a "similarity of appearance and sound" exists which would result in consumer confusion.¹⁵³ After reviewing the two marks, the court affirmed the lower court's finding that the marks were dissimilar.¹⁵⁴

The court then addressed the similarity of goods and services, and similarity of facilities—the third and fourth *Pizzeria Uno* factors.¹⁵⁵ The court again found that the lower court did not err in finding the goods, services, and facilities to be so dissimilar as to create no likelihood of confusion.¹⁵⁶ In so finding, the court compared the services and facilities of both PSC and JRP and held that "[b]esides the sale of fuel, the two parties' services and facilities differ in virtually every respect."¹⁵⁷ The court also noted that even if by chance a PSC customer was confused and attempted to purchase fuel at a JRP card lock sta-

ously registered trademarks that included the term PETRO." *Id.* To obtain registration, PSC countered that "the term 'Petro' is entitled to a very narrow scope of protection," and "that the term is extremely dilute and entitled to a weak scope of protection." *Id.* (internal quotation marks omitted). In contrast, in this litigation, PSC was asking the court for broad protection for its PETRO marks, which the court denied. *Id.*

148. *Id.*

149. *Id.*

150. *Id.*

151. *Id.* (citing *Lone Star Steakhouse & Saloon, Inc. v. Alpha of Va., Inc.*, 43 F.3d 922, 936 (4th Cir. 1995); *Pizzeria Uno*, 747 F.2d at 1534-35).

152. *Id.*

153. *Id.* (quoting *Pizzeria Uno*, 747 F.2d at 1534).

154. *Id.* The court noted that PSC's marks use green, white and red-orange, while JRP's marks use red, white and blue (and sometimes gray). *Id.* Additionally, the court focused on JRP's use of "James River" or "JR" in its marks along with lines that signify movement, and that the use of "JR" was the "dominant portion" of the mark. *Id.*

155. *See id.* at 94-95.

156. *Id.*

157. *Id.* at 95; *see also supra* notes 7-11, 13-15 and accompanying text (describing the facilities and services available at PSC and JRP).

tion, he could not, because only CFN members can purchase fuel at JRP's facilities.¹⁵⁸

The court next addressed the similarity of the advertising used by both parties.¹⁵⁹ PSC argued that JRP "promotes its services in the CFN directories, in a manner similar to [PSC's] own promotion of its services in truck stop directories."¹⁶⁰ The court dismissed this by noting that CFN directories are available only to CFN customers (not to the public) and that drivers of a CFN company would only wish to visit those stations in which their CFN card would work.¹⁶¹ The court also noted the many differences between the types of advertising that each company uses,¹⁶² and held that the lower court did not clearly err in finding no likelihood of confusion under this factor.¹⁶³

The final factor addressed by the court was whether there were any instances of actual confusion between the two parties' marks. PSC argued that even one instance of actual confusion should be significant in determining the likelihood of confusion, and that the lower court erred by not giving proper weight to its showing of actual confusion.¹⁶⁴ The court, however, stated that PSC's "meager evidence of actual confusion is at best de minimis."¹⁶⁵ The court further stated that the evidence of so few cases of actual confusion creates a "presumption against likelihood of confusion in the future."¹⁶⁶

In holding that the *Park 'N Fly* decision does not preclude an incontestable mark from being deemed merely descriptive, and therefore weak, for purposes of the likelihood of confusion analysis, and that the lower court did not clearly err when applying the likelihood of confusion factors, the court affirmed the district court's decision that JRP did not infringe upon PSC's trademarks.¹⁶⁷

158. *Petro Stopping Ctrs.*, 130 F.3d at 95; see *supra* notes 14-15 and accompanying text (discussing the Commercial Fueling Network and the "card lock" fueling system).

159. *Petro Stopping Ctrs.*, 130 F.3d at 95.

160. *Id.*

161. *Id.* (reasoning that the exclusivity of the CFN makes any confusion unlikely).

162. *Id.*; see *supra* notes 9, 17 and accompanying text (comparing the advertising used by PSC and JRP).

163. *Petro Stopping Ctrs.*, 130 F.3d at 95. The likelihood of confusion factor concerning the defendant's intent was not raised on appeal and was therefore not addressed by the court. *Id.*

164. *Id.* ("[PSC] maintains that courts normally accord significance to even one instance of actual confusion.").

165. *Id.* (citing *Universal Money Ctrs., Inc. v. American Tel. & Tel. Co.*, 22 F.3d 1527, 1535 (10th Cir. 1994)).

166. *Id.* (internal quotation marks omitted) (quoting *Amstar Corp. v. Domino's Pizza, Inc.*, 615 F.2d 252, 263 (5th Cir. 1980)).

167. *Id.*

4. *Analysis*.—In *Petro Stopping Centers*, the Fourth Circuit affirmed its earlier holding in *Lone Star* that the incontestability of a trademark does not make a “weak” mark “strong” for purposes of the “likelihood of confusion” analysis in an infringement action, but is only to be used to determine the validity of the mark.¹⁶⁸ Additionally, the court held that the district court’s finding that no likelihood of confusion existed between the two parties’ trademarks was not clearly erroneous.¹⁶⁹ The *Petro Stopping Centers* holding, that incontestability is only to be taken into account when determining the validity of a trademark in an infringement action, is directly in line with Fourth Circuit precedent. This holding strengthens the Fourth Circuit’s position that incontestability has no weight in a likelihood of confusion analysis, and is consistent with both the guidance and the intent of Congress, while balancing the competing interests that exist in trademark law.¹⁷⁰

The decision in *Petro Stopping Centers* finds its roots in the Supreme Court’s *Park ‘N Fly* decision. In that case, the Supreme Court held that a trademark owner can bring an action for infringement of an incontestable mark, and that the defendant cannot defend the action on the basis that the mark is merely descriptive, and therefore not valid.¹⁷¹ However, the Supreme Court did not hold, as PSC asserted, that a mark’s incontestable status “forecloses any argument that [the mark] is descriptive.”¹⁷² In fact, the *Park ‘N Fly* Court remanded the case to the district court to determine whether a likelihood of confusion actually existed.¹⁷³ Therefore, the Court did not address the question of whether or not incontestability has any bearing on the strength of the mark in a likelihood of confusion analysis.¹⁷⁴

168. *Id.* at 92 (“[I]ncontestability affects the validity of the trademark but does not establish the likelihood of confusion necessary to warrant protection from infringement.” (internal quotation marks omitted) (quoting *Lone Star Steakhouse & Saloon, Inc. v. Alpha of Va., Inc.*, 43 F.3d 922, 935 (4th Cir. 1995))).

169. *Id.* at 95.

170. See *supra* notes 47-51 and accompanying text (discussing the competing interests of trademark law).

171. *Park ‘N Fly, Inc. v. Dollar Park & Fly, Inc.*, 469 U.S. 189, 205 (1985). See *supra* notes 102-106 and accompanying text for a more detailed discussion on the *Park ‘N Fly* decision.

172. *Petro Stopping Ctrs.*, 130 F.3d at 92.

173. *Park ‘N Fly*, 469 U.S. at 205.

174. See *Petro Stopping Ctrs.*, 130 F.3d at 92 (stating that *Park ‘N Fly* “did not hold[] that the descriptive nature of a mark may not be considered in the separate likelihood of confusion inquiry”); *Munters Corp. v. Matsui Am., Inc.*, 909 F.2d 250, 252 (7th Cir. 1990) (“The Supreme Court’s holding in *Park ‘N Fly* does not address likelihood of confusion. In fact the Court specifically directed the district court to consider the likelihood of confusion

The Supreme Court's failure in *Park 'N Fly* to address the impact of incontestability on the strength of the mark, in a likelihood of confusion analysis, left the courts with no guidance on the subject.¹⁷⁵ In 1988, Congress amended the text of 15 U.S.C. § 1115(b) to clarify the incontestability provisions by providing that although incontestable status is conclusive evidence of the validity of the registered mark "[s]uch conclusive evidence of the right to use the registered mark shall be subject to proof of infringement as defined in section 32."¹⁷⁶ The Lanham Act states that infringement occurs when an individual uses the valid trademark of another in a manner which "is likely to cause confusion."¹⁷⁷ This shows that even if incontestability grants an "exclusive right" to use a mark, that use is subject to a likelihood of confusion analysis. If Congress intended incontestability to be dispositive in a likelihood of confusion analysis, there would be no need to condition the "exclusive right" to use an incontestable mark by requiring a confusion analysis. In support of this position, a commentator has stated that the Senate Committee made it "clear that incontestability does not relieve the owner of an incontestable registration from the burden of proving likelihood of confusion."¹⁷⁸ Therefore, with this revision, Congress attempted to eliminate any confusion stemming from the *Park 'N Fly* decision and to ensure that the incontestability of a mark was to affect only the validity of the mark and not its strength.¹⁷⁹

In his dissent in *Park 'N Fly*, Justice Stevens expressed concerns over the Court's holding because of the nonadversarial nature of the registration process.¹⁸⁰ He felt that even though trademark applications are reviewed by competent personnel, the possibility for errors

argument on remand." (citing *Park 'N Fly*, 469 U.S. at 205)); *Oreck Corp. v. U.S. Floor Sys., Inc.*, 803 F.2d 166, 171 (5th Cir. 1986) (stating that the *Park 'N Fly* holding does not address whether incontestability is to be a factor in determining likelihood of confusion).

175. See 1 GILSON & LALONDE, *supra* note 25, § 4.03[3][D][f], at 60 (stating that "[i]n the aftermath of *Park 'N Fly*, the courts were faced with the question of whether incontestable marks must be considered strong for likelihood of confusion analysis" and that the courts still have not come to a unanimous agreement on the issue).

176. Trademark Law Revision Act of 1988, Pub. L. No. 100-667, § 128(b)(1), 102 Stat. 3935, 3945 (codified at 15 U.S.C. § 1115(b) (1994)).

177. 15 U.S.C. § 1114(1)(a).

178. CHISUM & JACOBS, *supra* note 23, § 5E[1][b], at 171.

179. See *id.* (stating that "[t]he better view, confirmed by the 1988 amendment, is that incontestability pertains only to validity").

180. *Park 'N Fly, Inc. v. Dollar Park & Fly, Inc.*, 469 U.S. 189, 212 (1985) (Stevens, J., dissenting) (noting that "the possibility of error [during the registration process that a 'merely descriptive mark' obtains registration] is always present, especially in nonadversary proceedings" (footnote omitted)).

did exist.¹⁸¹ Justice Stevens's concern was that merely descriptive trademarks with no secondary meaning may be registered in error, and if left unchallenged for the required five years, would become incontestable.¹⁸² This, in his mind, would lead to marks which are not entitled to protection under the Lanham Act (because they are "merely descriptive") becoming valid as a matter of law.¹⁸³

These concerns are well founded and valid. However, by holding that incontestability does not affect the strength of the mark for purposes of the likelihood of confusion analysis, the potential for harm to society and free market competition is greatly reduced, if not eliminated. This is because the "governing standard in trademark infringement actions is 'likelihood of confusion,'"¹⁸⁴ and as long as incontestability does not affect this portion of the infringement test, the infringement test will remain equally balanced because only one half of the infringement test will be affected by incontestability.¹⁸⁵ Because incontestability affects only validity in the infringement analysis in the Fourth Circuit, it will not create strong marks as a matter of law.¹⁸⁶ This will make it more difficult for a holder of an incontestable weak mark than a holder of an incontestable strong mark to show

181. *Id.*

182. *Id.*

183. *See id.* at 211-12 (stating that "Congress could not have intended that incontestability should preserve a merely descriptive trademark from challenge when the statutory procedure for establishing secondary meaning was not followed and when the record still contains no evidence that the mark has ever acquired secondary meaning," for this result would mean that the mere "passage of time [can] transform[] an inherently defective mark into an incontestable mark").

184. *Sun-Fun Prods., Inc. v. Sontan Research & Dev. Inc.*, 656 F.2d 186, 189 (5th Cir. 1981) (quoting 15 U.S.C. § 1114 and citing *Exxon Corp. v. Texas Motor Exch.*, 628 F.2d 500, 504 (5th Cir. 1980)); *see also* *Mushroom Makers, Inc. v. R.G. Barry Corp.*, 580 F.2d 44, 47 (2d Cir. 1978) ("It is well settled that the crucial issue in an action for trademark infringement or unfair competition is whether there is any likelihood that an appreciable number of ordinarily prudent purchasers are likely to be misled, or indeed simply confused, as to the source of the goods in question." (citing *Maternally Yours, Inc. v. Your Maternity Shop, Inc.*, 234 F.2d 538, 542 (2d Cir. 1956))).

185. Balance in the infringement test will be maintained because incontestability will only sway one half of the infringement test (validity of the mark) in favor of the holder of the incontestable mark. By having the remaining half of the test (likelihood of confusion) unaffected by incontestability, the holder of an incontestable mark which is "merely descriptive" will not receive very broad protection. If a mark was to be considered strong as a matter of law because it is incontestable, than the holder of a registered but "merely descriptive" mark would receive broader protection than if the mark was only considered "merely descriptive" (and therefore weak). This result would seem to grant an effective monopoly in merely descriptive language to the holder of the mark, which is in conflict with the goals of trademark law.

186. *See* *Lone Star Steakhouse & Saloon, Inc. v. Alpha of Va., Inc.*, 43 F.3d 922, 935 (4th Cir. 1995) (stating that "incontestability affects the validity of the trademark but does not establish the likelihood of confusion necessary to warrant protection from infringement"

infringement because incontestability will not create the presumption of a strong mark.¹⁸⁷ If a party has a weak mark, it will need to make a stronger showing with respect to the remaining six *Pizzeria Uno* factors to show infringement.¹⁸⁸ Therefore, unless an intentional act of infringement took place, it will be much more difficult for a plaintiff to show a likelihood of confusion.¹⁸⁹

The concern over the potential for the trademark holder to obtain a "monopoly" of merely descriptive language is practically eliminated by the Fourth Circuit's decision in *Petro Stopping Centers*. By holding that incontestability does not affect the strength of the mark in a likelihood of confusion analysis, the court places the burden on the holder of an incontestable mark to prove infringement.¹⁹⁰ Because the strength of a mark is the "first and paramount factor"¹⁹¹ in determining whether a likelihood of confusion exists, a district court must consider the amount of protection the holder of the incontestable mark is to receive.¹⁹² The weaker the mark, the less likely that confusion between the marks will be found.¹⁹³ Therefore, by holding

for the "[l]ikelihood of consumer confusion remains an independent requirement for trademark infringement").

187. The strength of the mark is the most important factor in the likelihood of confusion analysis. See *Pizzeria Uno Corp. v. Temple*, 747 F.2d 1522, 1527 (4th Cir. 1984) (stating that the "first and paramount factor [in a likelihood of confusion analysis] is the distinctiveness or strength of the two marks").

188. Because the *Pizzeria Uno* court described the strength of the mark as the "first and paramount factor" when determining if a likelihood of confusion exists, it must follow that if the mark of the person bringing the action is "weak," they will have to rely predominantly on the remaining six *Pizzeria Uno* factors to bring a successful infringement action.

189. See *Sun-Fun Prods., Inc. v. Suntan Research & Dev. Inc.*, 656 F.2d 186, 190 (5th Cir. 1981) (stating that "[e]vidence of intentional deception carries special weight in the calculus of determining likelihood of confusion" and "proof that a defendant chose a mark with the intent of copying the plaintiff's mark, standing alone, may justify an inference of confusing similarity" (citing *Exxon Corp. v. Texas Motor Exch.*, 628 F.2d 500, 506 (5th Cir. 1980); *Amstar Corp. v. Domino's Pizza, Inc.*, 615 F.2d 252, 263 (5th Cir. 1980))).

190. To show infringement, the *Petro Stopping Centers* court stated that the plaintiff must show it has "a valid, protectable trademark and that the defendant's use of a 'reproduction, counterfeit, copy, or colorable imitation,' . . . creates a likelihood of confusion." *Petro Stopping Ctrs.*, 130 F.2d at 91 (citing 15 U.S.C. § 1114(1); *Lone Star*, 43 F.3d at 930).

191. *Pizzeria Uno*, 747 F.2d at 1527.

192. Basically, the district court will determine if the mark is weak or strong. See *Petro Stopping Ctrs.*, 130 F.2d at 92 (stating that the Fourth Circuit "recognize[s] that likelihood of confusion is an inherently factual issue" to be determined by the trier of fact in the district court and reviewed under the "clearly erroneous" standard).

193. This is inherent in the impact of the strength of the mark in a likelihood of confusion analysis. In the Fourth Circuit, as the strength of the mark is the "first and paramount factor" in determining if a likelihood of confusion exists, it follows that if the mark is weak, the trademark holder will have to make a much stronger showing in the remaining factors to show infringement. *Id.*; see also *supra* notes 187-188 and accompanying text (emphasizing reliance on other factors when a mark is weak).

that incontestability does not affect the likelihood of confusion analysis, the Fourth Circuit has placed a check on the exclusive use of merely descriptive marks. This will prevent "monopolies" on merely descriptive language by allowing the original holder to keep using his mark while permitting others to use similar language.

Additionally, the application of the incontestability doctrine in the manner set forth in *Petro Stopping Centers* equally balances the competing interests in trademark law.¹⁹⁴ One such interest is that of the trademark owner in maintaining customer "goodwill."¹⁹⁵ As interpreted by the Fourth Circuit in *Petro Stopping Centers*, two aspects of the doctrine of incontestability allow the holder of a mark to maintain "goodwill" with his customer base. First, the mark remains valid and the holder may continue to use it. Therefore, the advertising and customer base that the holder has developed over the five years leading up to the incontestable status of the mark, and beyond, is not wasted. Even though a court may still consider the mark merely descriptive and therefore weak, incontestability will ensure the continued validity of the mark for both "offensive" and "defensive" use, even though a court may find it "merely descriptive" with no secondary meaning.¹⁹⁶ Second, the strength of a mark is not the only factor to be considered in a likelihood of confusion analysis.¹⁹⁷ Thus, although a competitor may be able to use similar language because the incontestable mark is descriptive and weak, she would not be permitted to use a near duplicate of the mark.¹⁹⁸ Many courts have held that the weight and use of the factors to determine whether a likelihood of confusion exists var-

194. See *supra* notes 47-51 and accompanying text (explaining the competing interests that must be balanced in trademark law).

195. See *supra* note 49 (explaining the interest in protecting the "goodwill" of a mark's owner in the community).

196. This is because 15 U.S.C. § 1115(b) specifically states that incontestability "shall be conclusive evidence of the validity of the registered mark and of the registration of the mark, of the registrant's ownership of the mark, and of the registrant's *exclusive right* to use the registered mark in commerce." 15 U.S.C. § 1115(b) (1994) (emphasis added). Of course, this exclusive right is subject to the enumerated defenses of § 1115(b). See *supra* note 86 and accompanying text.

197. See *supra* notes 75-78 and accompanying text (discussing the factors considered by the Fourth Circuit in determining whether a likelihood of confusion exists).

198. By using a "near duplicate" of a weak, but incontestable mark, a defendant in an infringement suit would run afoul of at least one of the *Pizzeria Uno* factors, the "similarity of the two marks." See *supra* note 76 and accompanying text (listing the seven *Pizzeria Uno* factors which are used in the Fourth Circuit for the likelihood of confusion test). As "[n]ot all of the[] [factors] are always relevant or equally emphasized in each case," a court would certainly give great weight to the similarity of the marks when the allegedly infringing mark is a near duplicate. *Pizzeria Uno Corp. v. Temple*, 747 F.2d 1522, 1527 (4th Cir. 1984) (quoting *Modular Cinemas of Am., Inc. v. Mini Cinemas Corp.*, 348 F. Supp. 578, 582 (S.D.N.Y. 1972)).

ies in each case.¹⁹⁹ For example, if a plaintiff has a mark that is determined to be weak, but can show that the defendant intentionally copied his mark, that evidence would carry "special weight."²⁰⁰ "[P]roof that a defendant chose a mark with the intent of copying [the] plaintiff's mark, standing alone, may justify an inference of confusing similarity."²⁰¹ Therefore, if a court finds a plaintiff's mark is weak, the court is not precluded from finding that a likelihood of confusion exists and ruling in the plaintiff's favor. Even though incontestability will "not make a weak mark strong,"²⁰² a trademark holder will be able to keep his mark, and he will be protected from infringement by the remaining factors of the likelihood of confusion analysis.²⁰³

However, because the strength of a mark is the "first and paramount factor"²⁰⁴ in a likelihood of confusion analysis, another competing interest of trademark law, the public and potential competitors' interest in a free market, is protected by the holding in *Petro Stopping Centers*.²⁰⁵ If a plaintiff's mark is determined to be weak, he will have to make a strong showing with regard to the remaining factors to show that a likelihood of confusion exists. This extra weight given to the strength of a mark will provide an extra burden on the holder of a descriptive, and therefore weak, mark to show infringement. This prevents the holder of a weak mark from having a "monopoly" on descriptive language, which would foreclose anyone else

199. See *Petro Stopping Ctrs.*, 130 F.3d at 91 (stating that likelihood of confusion factors "are not of equal importance or equal relevance in every case" (citing *Pizzeria Uno*, 747 F.2d at 1527)).

200. *Sun-Fun Prods., Inc. v. Suntan Research & Dev. Inc.*, 656 F.2d 186, 190 (5th Cir. 1981).

201. *Id.* (citing *Exxon Corp. v. Texas Motor Exch.*, 628 F.2d 500, 506 (5th Cir. 1980); *Amstar Corp. v. Domino's Pizza, Inc.*, 615 F.2d 252, 263 (5th Cir. 1980)).

202. *Oreck Corp. v. U.S. Floor Sys., Inc.*, 803 F.2d 166, 171 (5th Cir. 1986).

203. Because no lone factor is dispositive in a likelihood of confusion analysis, a trademark holder can have a weak mark and yet still show that the remaining factors create a likelihood of confusion. See *supra* notes 199-202 and accompanying text (discussing the varying weight that may be given to different factors of the *Pizzeria Uno* "likelihood of confusion" test, depending on the circumstances of the case).

204. *Pizzeria Uno*, 747 F.2d at 1527.

205. See *supra* notes 47-51 and accompanying text (discussing the competing interests of trademark law). By holding that incontestability does not affect the strength of the mark for purposes of the likelihood of confusion analysis, the Fourth Circuit protected the public's and competitors' interest in a free market; because the holding prevents holders of weak, but incontestable, marks from having a monopoly on a "merely descriptive" mark. If incontestability operated as a matter of law to make a weak mark strong, then the holder of that weak mark could easily use that "strength" as a weapon to prevent others from using similar "descriptive" language in the marketing of their products. This would fly in the face of the interest to allow others to compete freely in an open market and grant wide protection to a mark, that would only receive very narrow protection (if any at all) were it not for its incontestability.

from using that language in describing their own product. The very nature of a free market requires that multiple competitors try to sell the same or similar product, and the Fourth Circuit's application of the incontestability doctrine aids in that end.

Another competing interest is the need for a "fair and efficient legal system."²⁰⁶ This interest is also achieved by the limitation on the effect of incontestability in a likelihood of confusion analysis. If incontestability could turn a weak descriptive mark into a strong mark as a matter of law, then a "monopoly" on that descriptive language would be created. This would be unfair both to innocent competitors and to the consuming public. One should not be denied the opportunity to fairly compete in a free market. Additionally, if the court had not followed its precedent, it would have placed the Fourth Circuit's decisional law in disarray, leaving the door open for more litigation on the impact of incontestability and taking away from the "efficiency" of the judicial system in the Fourth Circuit.²⁰⁷

The final competing interest of trademark law is to protect consumers from being confused about the origin of products.²⁰⁸ The potential for consumer confusion is held in check in a way similar to the way a trademark holder's "goodwill" interest is protected.²⁰⁹ This is because the test for likelihood of confusion has seven independent factors, which are weighed differently in each fact situation, thereby ensuring that the similarity of descriptive language in competing marks will not be dispositive in an infringement action by favoring either the plaintiff or the defendant.²¹⁰ The holder of a descriptive, but incontestable, mark is protected from having his customers become confused because he can rely on the other six *Pizzeria Uno* factors to demonstrate a likelihood of confusion.²¹¹ Therefore, although this application of incontestability may allow a competitor to use simi-

206. CHISUM & JACOBS, *supra* note 23, § 5A, at 8.

207. See *supra* note 51 and accompanying text (discussing the interest of trademark law in a "fair and efficient legal system").

208. See *supra* note 48 and accompanying text (stating that confusion impedes customers from making free and informed purchasing decisions).

209. See *supra* notes 196-203 and accompanying text (discussing the analysis of the holding in *Petro Stopping Centers* and how it protects the interest of the trademark holders' "goodwill").

210. See *supra* note 77 and accompanying text (describing the case-by-case treatment of the relevant factors).

211. See *supra* note 76 and accompanying text (setting forth the seven factors to be taken into account in the likelihood of confusion analysis). A determination that a mark is weak does not preclude a trademark owner from successfully prosecuting an infringement action. See *supra* note 77 and accompanying text (noting that not all of the factors will carry equal weight in each analysis, therefore allowing the plaintiff to make a strong showing in the other six factors to be successful in an infringement action).

lar descriptive language, the public will be protected from confusion by proper application of the remaining factors, which ensure fair competition.

The holding in *Petro Stopping Centers* clearly advances the views of incontestability illustrated by the Supreme Court in *Park 'N Fly*, and by Congress in the creation and subsequent revisions of the Lanham Act, while balancing the competing interests which exist in trademark law. The prevention of confusion among consumers regarding the origin of goods is protected by the many factors which carry flexible weight, allowing an analysis to be customized to the facts of any situation.²¹² The interest of a trademark owner in maintaining his "goodwill" is protected by the incontestable validity of his mark, along with the additional factors he can use to show a likelihood of confusion. The common interest in free competition is protected by the additional importance given to the "strength" of the mark when determining if a likelihood of confusion exists, causing the holder of a merely descriptive mark to make a stronger showing in the other factors to show infringement.²¹³

5. *Conclusion.*—In holding that incontestability does not affect the "strength" of a trademark when determining if a likelihood of confusion exists, the Fourth Circuit has followed its precedent and solidified its case law on the doctrine of incontestability.²¹⁴ The Fourth Circuit has properly applied the intent of the Congress²¹⁵ by ensuring that incontestability is used only to define the validity of a mark and not to affect a likelihood of confusion analysis. This holding also maintains a balance between the competing interests of trademark law, and ensures that no "monopolies" will be granted for merely descriptive language. With its holding in *Petro Stopping Centers*, the Fourth Circuit has made it clear that "[i]ncontestable status does not make a weak mark strong."²¹⁶

TERRANCE J. WIKBERG

212. See *supra* notes 207-211 and accompanying text (analyzing the impact of the *Petro Stopping Centers* holding on the interest of trademark law in the prevention of confusion among consumers).

213. See *supra* notes 204-205 and accompanying text (explaining how the common interest of the public and potential competitors in a free market is protected by the holding in *Petro Stopping Centers*).

214. *Petro Stopping Ctrs.*, 130 F.3d at 95.

215. See *supra* notes 175-179 and accompanying text.

216. *Oreck Corp. v. U.S. Floor Sys., Inc.*, 803 F.2d 166, 171 (5th Cir. 1986).